(1)

SHOW PROCEEDINGS AND ORDERS DATE: [01/31/89]

CASE NBR: [88105746] CSY STATUS: [ ]
SHORT TITLE: [Hamilton, Bernard Lee]
VERSUS [California] DATE DOCKETED: [102588]
PAGE: [01]

DATE	NOTE	PROCEEDINGS & ORDERS
Sep 16 1988		Application (A88-220) to extend the time to file a petition for a writ of certiorari from September 26, 1988 to October 26, 1988, submitted to Justice O'Connor.
Sep 19 1988		Application (A88-220) granted by Justice O'Connor extending the time to file until October 26, 1988.
Oct 25 1988		Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Nov 9 1988		Brief of respondent California in opposition filed.
Nov 23 1988		DISTRIBUTED. December 9, 1988
Nov 23 1988		Reply brief of petitioner Bernard Lee Hamilton filed.
Dec 7 1988		Response requested. (Due December 15, 1988)
Dec 29 1988		Record filed.
Jan 5 1989		REDISTRIBUTED. January 19, 1989
Jan 23 1989		The petition for a writ of certiorari is denied. Justice Brennan, dissenting: Adhering to my view that the death

CASE NBR: [88105746] CSY STATUS: [ ]
SHORT TITLE: [Hamilton, Bernard Lee]
VERSUS [California] DATE DOCKETED: [102588]
PAGE: [02]

DATE	NOTE	PROCEEDINGS & ORDERS
Jan 23 1989		The petition for a writ of certiorari is denied. Justice Brennan, dissenting: Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case. Dissenting opinion by Justice Marshall. (Detached opinion.)
Jan 26 1989		Record returned to Supreme Court of CA.

Command:[ ]

Original

88-5746

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BERNARD LEE HAMILTON, *Petitioner*

vs.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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QUESTIONS PRESENTED

I

Did the California Supreme Court deprive petitioner of procedural due process when it ignored this Court's limited remand for further consideration in light of *Rose v. Clark* (1986) 478 U.S. 570, treated this Court's order instead as the equivalent of a summary reversal, and sua sponte reconsidered and decided adversely to Petitioner certain issues unaffected by the terms of this Court's limited remand?

II

Was the trial court's denial of Petitioner's timely motion to represent himself at the penalty phase a denial of Petitioner's Sixth Amendment right to represent himself and to personally plead for his own life?

III

Did the instructions of the trial court coupled with the prosecution's voir dire and closing argument mislead the jury concerning the discretion it had to extend leniency by informing the jury that they had no choice but to vote for the death penalty if the factors in aggravation outweighed those in mitigation even if the jurors still felt that, under those circumstances, death was not the appropriate punishment?

LIST OF PARTIES (RULE 28.1)

The parties to the proceedings below were petitioner Bernard Lee Hamilton and respondent State of California.

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TABLE OF AUTHORITIES

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BERNARD LEE HAMILTON, *Petitioner*

vs.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Petitioner BERNARD LEE HAMILTON respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of California, entered in the above entitled proceeding on May 19, 1988.

OPINIONS BELOW

The opinion of the California Supreme Court is reported at *People v. Hamilton* (1988) 45 Cal.3d 351 and is reproduced in the Appendix hereto at A-1 through A-35.

JURISDICTION

This case comes before this Court following the granting of Respondent's petition for writ of certiorari by this Court on July 7, 1986. *California v. Hamilton* (1986) 478 U.S. 1017. In that order, this Court vacated the opinion of the California Supreme Court in *People v. Hamilton* (1985) 41 Cal.3d 408 and remanded the case, "for further consideration in light of *Rose v. Clark*. 478 U.S. [570] (1986)"

Following this Court's remand, the judgment of the Supreme Court of California was entered on May 19, 1988, affirming petitioner's conviction for capital murder and sentence of death. Petitioner filed a Petition for Rehearing. (Appendix 36-60) The

California Supreme Court denied that petition on July 28, 1988. (Appendix at A-61-62).

Thereafter, Justice O'Connor signed an order extending the time for filing this petition for writ of certiorari to and including October 26, 1988. (Appendix at 63)

On August 31, 1988, the California Supreme Court issued an order staying petitioner's execution pending final determination of this petition for writ of certiorari. (Appendix at 64)

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

STATUTES AND CONSTITUTIONAL AUTHORITIES INVOKED

United States Constitution, Fifth, Sixth, Eighth and Fourteenth Amendments, and California Penal Code §§187 *et seq*.., California Rules of Court 24 (a) (See Appendix 65-72 for verbatim statement of these authorities.)

STATEMENT OF THE CASE

On May 31, 1979, the body of Eleanor Buchanan was discovered in a wooded area in San Diego County, California; the body was missing its head and hands. The victim was last seen alive leaving her math class at Mesa College on the evening of May 30th.

On June 1st, petitioner arrived in Terrell, Texas in a van belonging to the victim. A week later, petitioner was arrested in Oklahoma for using credit cards belonging to the victim. When the police ran a check on the VIN number of the van petitioner was driving, they found out that the van belonged to a homicide victim. Petitioner was returned to California to stand trial.

On July 11, 1979, petitioner was accused by information of one count each of murder, burglary, robbery, and kidnapping. In addition, three special circumstances were alleged in connection with the murder charges, thus making this a capital case. Cal. Pen. Code §§ 190.2 (17) (i), (ii), and (vii)

Jury trial commenced on September 8, 1980. On January 6, 1981, the jury returned verdicts of guilty on all counts. On that same

day, petitioner filed a motion to proceed *in propria persona* at the penalty phase of his trial; petitioner filed another similar motion on January 9, 1981. On January 15, 1981, petitioner's motion to proceed *in pro per* was heard with the other pre-penalty phase motions and was denied.

The presentation of evidence in the penalty phase began on January 20, 1981 and on February 2, 1981, the jury returned a verdict of death.

Petitioner appealed his conviction to the California Supreme Court and on December 31, 1985, the California Supreme Court issued its opinion in *People v. Hamilton* (1985) 41 Cal.3d 408, reversing both the special circumstance and penalty verdicts and remanding the case for a new trial on those issues.

On April 18, 1986, Respondent filed a petition for certiorari with this Court and on July 7, 1988, this Court granted the petition, vacated the judgment of the California Supreme Court and remanded petitioner's case for "for further consideration in light of *Rose v. Clark*, 478 U.S. [570] (1986)." *California v. Hamilton* (1986) 478 U.S. 1017

Following this Court's remand, the judgment of the Supreme Court of California was entered on May 19, 1988, affirming petitioner's conviction for capital murder and his sentence of death. In its opinion, the California court held that this Court's remand "for further consideration" rendered its decision in *Hamilton I* "a nullity and as such has no binding force." 45 Cal.3d at 363

The California Supreme Court denied a timely petition for rehearing on July 28, 1988.

ARGUMENT

I

THE CALIFORNIA SUPREME COURT DEPRIVED PETITIONER OF PROCEDURAL DUE PROCESS WHEN IT IGNORED THIS COURT'S LIMITED REMAND FOR FURTHER CONSIDERATION IN LIGHT OF ROSE V. CLARK (1986) 478 U.S.570, TREATED THIS COURT'S ORDER INSTEAD AS THE EQUIVALENT OF A SUMMARY REVERSAL, AND SUA SPONTE RECONSIDERED AND DECIDED ADVERSELY TO PETITIONER CERTAIN ISSUES UNAFFECTED BY THE TERMS OF THIS COURT'S LIMITED REMAND

A

Statement of Facts

In its first decision in petitioner's case, *People v. Hamilton* (1985) 41 Cal.3d 408 (hereinafter, *Hamilton I*), the California Supreme Court affirmed petitioner's murder conviction, but reversed the jury's findings of special circumstances (which made defendant death eligible) because the jury was not instructed that must find that the defendant intended to kill. *Carlos v. Superior Court* (1983) 35 Cal.3d 131

Following this Court's remand for "further consideration in light of *Rose v. Clark* (1986) 478 U.S. 570" *California v. Hamilton* (1986) 478 U.S. 1017, the California Supreme Court issued its opinion in *People v. Hamilton* (1988) 45 Cal.3d 351 (hereinafter, *Hamilton II*). Instead of complying with this Court's specifically limited remand to reexamine its decision in *Hamilton I* in light of the harmless error test of *Rose v. Clark, supra*, the California Supreme Court held, without benefit of citation to relevant authority, that *Hamilton I* was "a nullity."

Without so much as a cursory discussion the harmless error test of *Rose v. Clark, supra*, the California Supreme Court unilaterally redetermined adversely to petitioner its prior holding of underlying instructional error in the special circumstance findings; the court's decision in *Hamilton II* was based upon a case decided by that court after this Court's remand order. The California court incorporated, without restating, *Hamilton I*'s discussion of guilt phase issues and went on to find that the death penalty was properly imposed.

In sum, the California Supreme Court failed entirely to comply with this Court's instructions and, instead, arrogated to itself the wholly different task of reconsidering other issues unrelated to and outside the scope of the order of this Court. The one thing the California Supreme Court did not do was to obey this Court's order to simply reexamine its decision in *Hamilton I* in light of *Rose v. Clark*, *supra*,.

B

This Court's remand of Petitioner's case for "further consideration in light of *Rose v. Clark* " did not render the decision in *Hamilton I* "a nullity."

In the only case in which a majority of this Court has discussed the scope of "granted, vacated, and remanded for further consideration" order, this Court has explicitly held that a remand for further consideration in light of an intervening case, "[does] not amount to a final determination on the merits." *Henry v. City of Rock Hill* (1964) 376 U.S. 776, 777[1] In *Henry*, *supra*, this Court had remanded a case to the South Carolina Supreme Court for, "further consideration in light of *Edwards v. South Carolina* 372 U.S. 229." The Court noted that,

> "That has been our practice in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent, we remand the case to the state court for reconsideration." *Id.* at 776

After noting that the remand "did not amount to a final determination on the merits," this Court added,

> "That order did, however, indicate that we found *Edwards* sufficiently analogous and, perhaps, decisive to compel re-examination of the case." *Id.* at 777 [2]

[1] The only other case decided by a majority of this Court which discusses this issue that counsel has been able to locate is *Goldbaum v. United States* (1954) 348 U.S. 905, 906, another case remanded for reconsideration in light of intervening precedent where this Court noted, *inter alia*, that

> "[w]e have not considered the merits of these cases, nor have we determined their relation to our recent opinions, *supra*, believing that re-examination by the Courts of Appeals is desirable even in those cases remotely involving the principles laid down in the...decisions."

In *Trustees of Keene State College v. Sweeney* (1978) 439 U.S. 24, Justice Stevens briefly discussed the issue in dissent.

[2] The Fifth Circuit has similarly characterized the "reconsideration" order.

It follows that a remand which is not in itself a final judgment on the merits can hardly be said to render a final judgment of a state Supreme Court a "nullity." Yet that is exactly how the California Supreme Court characterized this Court's remand in petitioner's case, "for further consideration in light of *Rose v. Clark*." Significantly, the California Supreme Court has also recently equated the limited remand in petitioner's case with this Court's order in *California v. Brown* (1987) _ U.S.__, 107 S.Ct. 837, 841 where this Court reversed the California court's decision and, "remanded [the cause] for further proceedings not inconsistent with this opinion." *People v. Brown* (1988) 45 Cal. 3d 1247[3]

This Court conducts its review on an issue by issue basis as presented in the petitions for writ of certiorari, not on a case by case basis in which a petitioner presents his entire case for review at large. *J.I. Case Co. v. Borak* (1964) 377 U.S. 426 This Court will not reach issues not presented in the petition for certiorari. *Heath v. Alabama* (1985) __U.S.__, 106 S.Ct. 433 If this Court had granted certiorari on the *Rose v. Clark* issue and decided it, the remainder of the California decision would have remained in full force and effect and the California Supreme Court could not have used it as a vehicle to reopen other issues.

By misinterpreting the effect of this Court's remand, the California Supreme Court also violated petitioner's right to

> "It is our understanding in this type of remand that the Court has merely 'flagged' this case as one upon which the intervening decision may have some bearing, but which the court has not conclusively determined to be materially affected thereby." *Bush v. Lucas* (5th Cir. 1981) 647 F.2d 573, 575

The Ninth Circuit has likewise rejected the conclusion that a remand for reconsideration in light of an intervening precedent is the equivalent of a summary reversal.

> "It would be all but impossible to distinguish between cases in which only reconsideration was intended and those in which reversal was thought proper. Consequently, our duty is to read the intervening Supreme Court decision fairly and determine whether it requires a different result." *Ostrofe v. H.S. Crocker., Inc.* (9th Cir. 1984) 740 F.2d 739, 748

[3] Compare the statement in *Brown*, *supra*, "Our judgment was reversed and the cause remanded for proceedings not inconsistent with the high court decision. (*California v. Brown* (1987) 479 U.S.__)....[The] vacation of this court's 'judgment' technically leaves all appellate issues at large" 45 Cal.3d at 1251, with *Hamilton*, *supra* , "the United States Supreme Court vacated the judgment in *Hamilton I* and rendered the decision a nullity." 45 Cal.3d at 363

procedural due process by reexamining issues that were beyond the scope of the remand. California Rules of Court 24 (a) provides that,

> "A decision of the Supreme Court becomes final 30 days after filing...When a decision of a reviewing court is final as to that court, it is not thereafter subject to modification or rehearing by that court..."

Petitioner was entitled to the dispositive effect of Rule 24 and the California court's evisceration of that right through the device of unilaterally expanding the scope of this Court's remand violated due process. It is fundamental that a deprivation of state procedural due process is a violation of federal due process. *Hicks v. Oklahoma* 447 U.S. 343 (1979) This is especially true in a death penalty case.

C.

Why this Court should grant Certiorari.

In the October, 1985 term, the same term in which this Court remanded petitioner's case, "for further consideration in light of...", this Court took similar action with regard to over seventy other cases. Yet despite the frequency with which this Court uses that procedural device to afford lower courts the opportunity to reexamine their decisions in light of intervening decisions of this Court, *Henry v. City of Rock Hill, supra*, is the only case that discusses the significance of this action in any detail, and in that case, the discussion is contained in a mere three sentences.

Moreover, except for Professor Hellman's law review article, Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases held for Plenary Decisions*, 11 Hast. L. Rev 5 (1983) and a paragraph in Stern, Gressam and Shapiro, *Supreme Court Practice* (6th ed. 1986)[4] *Henry, supra*, has been cited only **three times** [5] for its relevant discussion in the twenty four years that have elapsed since that

[4] The fifth edition (1978) covered the subject in a single sentence accompanied by a brief footnote.

[5] *United States v. National Society for Professional Engineers* (D.C. Cir. 1975) 404 F.Supp 4597, 459; *State v. Anderson* (1971) 260 La. 113, 255 So.2d 348; *Commonwealth v. Rundle* (1964) 203 Pa. Super. 419, 201 A.2d 615

decision was announced. This is true despite the fact that this Court has issued an average of **sixty** such "GVR" dispositions a year[6] since the early 1970's. This may well be related to the fact that this Court's three sentence explanation of the meaning of "GVR" in *Henry* did not even merit a headnote in the official printed version of that decision.[7]

This has led to confusion as to exactly what this Court means by the order, "granted, vacated, and remanded for further consideration in light of..." As Professor Hellman notes,

> "[T]he significance of this form of disposition...remains a mystery to most of the legal profession. For example, some judges assume that a summary reconsideration order means no more than what it says: the lower court must reconsider its prior ruling, but it is free to reach the same result once again after the remand. Others think that the GVR is a reversal in all but name. The Supreme Court has given few clues to what it means by these orders, and little guidance is to be found in the secondary literature." Hellman, *The Supreme Court's Second Thoughts..., supra*, at 6 (footnotes omitted)

The confusion among the bench and bar and the obscurity of the *per curiam Henry* decision is best exemplified by the proceedings in petitioner's case. Despite the fact that, following the remand of this case to the California Supreme Court, there were a total of five supplemental briefs submitted by both petitioner and respondent and two oral arguments before the California Supreme Court, not once did counsel for either side or, for that matter, the court, refer to *Henry, supra*, its short line of progeny, or Professor Hellman's article when the effect of this Court's remand was discussed. The first time *Henry et al.* was brought to the California Supreme Court's attention was in the petition for rehearing filed by petitioner.

Counsel has found no other decision where a court has treated a "GVR" as affecting its previous opinion except as to those issues

[6] Hellman, *supra*, p.7 Interestingly, although Professor Hellman cites numerous cases in which the effect of a 'GVR' was discussed by the lower court, not one of them cited *Henry, supra*.

[7] There was a headnote, however, in the West edition of that decision located at 84 S.Ct. 1042.

highlighted by the reconsideration order and none where a court has treated it as rendering the opinion in its entirety a "nullity."

Because of the California Supreme Court's misunderstanding of this Court's remand order, instead of receiving a new trial on the special circumstance, and if necessary, the penalty phase of petitioner's case, as ordered by that court in *Hamilton I*, petitioner now awaits execution. This Court should grant certiorari to clearly explain the scope of a "GVR" order. Whatever meaning this Court supplies, it should not permit a state court to re-open issues otherwise foreclosed to it in violation of this Court's remand order.

II

THE TRIAL COURT'S DENIAL OF PETITIONER'S TIMELY MOTION TO REPRESENT HIMSELF AT THE PENALTY PHASE A DENIAL OF APPELLANT'S SIXTH AMENDMENT RIGHT TO REPRESENT HIMSELF AND TO PERSONALLY PLEAD FOR HIS OWN LIFE

A

Statement of Facts

On January 6, 1981, petitioner was found guilty of first degree murder and the special circumstances alleged were also found to be true. Immediately following the verdict, the trial court informed the jury that the penalty phase of the trial would not start until January 19th. (R.T. 4281)

On that same day the verdict was reached, petitioner filed a motion to proceed *in propria persona* at the penalty phase of his trial. (C.T. 1202-1203) Petitioner's motion was considered with the other pre trial motions on January 15, 1988. At that hearing, after indicating some of the sources of his displeasure with counsel's performance at the preceding trial, petitioner made it crystal clear that he wanted to represent himself, to personally plead for his own life.

> "I don't want any representation by any court appointed attorney. I would prefer to represent myself. I felt that if the Faretta decision -- I felt that was quite explicit as far as my right to representation."
>
> *****
>
> "I feel that it is my life on the line and I am the one who has to answer to everything that is charged against me, and if I feel that my attorney is not going to represent me adequately and if he is going to present a defense or a case inconsistent to that what I want to present, then I should be permitted to represent myself, in which the Faretta decision made clear that if I do represent myself and I am convicted, that I can't complain about inadequate representation. I can't use that at a later date..."
> (R.T. 4314-4315)

The trial court denied his motion, noting that his attorneys had "done an outstanding job in their representation of defendant." The court went on to state that:

> "[I]t would be a real travesty and a mockery if I were to permit Mr. Hamilton to represent himself...I have found it necessary

for Mr. Hamilton to be handcuffed and in shackles...He certainly can't represent himself being in chains...He has put stumbling blocks in the path of his attorneys. He has made suggestions which were absolutely preposterous as far as trial tactics are concerned...I can't conceive of Mr. Hamilton representing himself in this final phase of the trial..." (R.T. 4320-4321)

Although observing that petitioner's shackling was not relevant to his entitlement to act as his own lawyer, the California Supreme Court upheld the trial court's ruling, noting that,

> "[b]ecause defendant's request was filed in the midst of the jury's guilt phase deliberations, it was not timely for purposes of invoking an absolute right of self representation under *Faretta v. California, supra*, 422 U.S. 806" 45 Cal.3d at 369

The court rejected petitioner's contention that he had an absolute right to self representation because the motion was made two weeks before the penalty phase began, and that for the purposes of *Faretta* motion, the penalty phase was in reality, a separate trial.

> "The penalty phase has no separate formal existence, but is merely a stage in a unitary capital trial." 45 Cal.3d at 369

B

Petitioner was Denied his Right to Represent Himself and to Personally Plead for his Own Life in Violation of the Sixth Amendment of the United States Constitution

In *Faretta v. California* (1975) 444 U.S. 806, this Court held that a defendant in a criminal case has the absolute right to refuse appointed counsel and to represent himself.

> "The language and spirit of the Sixth Amendment contemplate that counsel...shall be an aid to a willing defendant - not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment." *Id.* at 820

Although *Faretta,supra*, does not itself address the issue of "timeliness," perhaps because the motion in that case was made, "weeks before trial." 422 U.S. 836, the California Supreme Court has held that a motion for representation that is not "timely made" is discretionary. *People v. Windahm* (1977) 19 Cal.3d 121

Petitioner, however, like the defendant in *Faretta, supra*, made his motion to represent himself, "weeks before trial;" there was a

fourteen day hiatus between the rendering of the guilty verdict and the commencement of the penalty trial.

The California court's characterization of the motion as being made, "in the midst of the jury's guilt phase deliberations" can most charitably be characterized as specious, because the motion was filed on the day the verdict came in, and did not contemplate substitution of counsel in the midst of deliberations; any ambiguity in the January 6th motion was rectified on January 9th when petitioner filed another motion asking to represent himself (C.T. 1268) and when petitioner orally addressed the trial court on January 15th.

Moreover, the California Supreme Court's characterization of the penalty phase as, "merely a stage in a unitary capital trial" for purposes of considering a *Faretta* motion, exalts form over substance and ignores the import of this Court's decision in *Bullington v. Missouri* (1981) 451 U.S. 430. In *Bullington, supra*, the defendant had been tried and convicted of "capital murder" under a Missouri statute very similar to California's statutory scheme. The Missouri law provided that, after the guilty verdict,

> "the court shall resume the trial and conduct a presentence hearing before the jury...at which time the only issue shall be the determination of the punishment to be imposed. In such hearing, subject to the laws of evidence, the jury...shall hear additional evidence in extenuation, mitigation, and aggravation..." Mo. Rev. Stat.§ 565.006.

In *Bullington*, the jury set the punishment at life. The defendant then moved for and was granted a new trial based upon jury selection issues. The prosecutor indicated that he would be seeking the death penalty again and the defendant sought pretrial review which led to the granting of certiorari by this Court.

In its opinion, this Court held that the Double Jeopardy clause applied to the first jury's determination that the punishment should be life because, unlike other sentencing procedures,

> "[t]he presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. **It was itself a trial on the issue of punishment** so precisely defined by the Missouri statutes." *Id.* at 437 (emphasis added)

A similar result was reached a few years later in *Arizona v. Rumsey* (1984) 467 U.S. 203, applying the principles of *Bullington, supra*, to the Arizona capital statute. See also *Young v. Kemp* (11th Cir. 1985) 760 F.2d 1097, 1106 (applying *Burlington* to the Georgia capital statute); *Jones v. Thigpen* (5th Cir. 1984) 741 F.2d 805, 814, *remanded on other grounds*, 106 S.Ct. 689 (1986) ("After *Bullington*, a capital sentencing proceding like Mississippi's is regarded as a second 'trial' at which the prosecution must again 'prove its case' if it is to obtain a death sentence.")

More recently, the applicability of *Bullington, supra*, rationale to the right to counsel and/or self representation, was noted by Justices Marshall and Brennan dissenting from the denial of certiorari in *Grandison v. Maryland* (1986) __U.S.__, 93 L.Ed.2d 174

> "In *Bullington v. Missouri*,...this Court held that the Double Jeopardy clause applied to the sentencing phase of a bifurcated trial. It did so because it found that a sentencing hearing was like a separate trial....It may require selection of a new jury..Evidence is offered...; the parties may present argument...; the jury is instructed,...; and the jury deliberates and determines sentence. The Maryland proceeding is in all respects a separate trial on the issue of punishment. **The waiver of the right to counsel at the first 'trial on guilt or innocence should therefore have no more bearing on a defendant's right to counsel in the sentencing phase that it would on that defendant's right to counsel in a separate trial on related crimes.** It should under no circumstances irrevocably bind a defendant in the sentencing phase." *Id.* 175-176

C

Why this Court Should Grant Certiorari.

This case presents the troubling specter of an accused facing the ultimate sanction of death who was prevented from personally pleading for his life to the jury that ultimately sentenced him to die. There was no ambiguity in his request; petitioner clearly stated that he wanted to be his own lawyer because he felt that,

> "it is my life on the line and I am the one who has to answer to everything that is charged against me, and if I feel that my attorney is not going to represent me adequately..."

In *Faretta*, this Court recognized that there is,

> "a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant

> is contrary to his basic right to defend himself if he truly wants to do so.
>
> *****
>
> "To thrust counsel upon the accused, against his considered wish, thus violates the logic of the [Sixth] Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists....An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense." *Id.* 422 U.S. at 817-820

That analysis applies with even more convincing force when the question to be argued to the jury is not merely whether or not the accused is guilty of a crime, but whether or not the accused will live or die.

Both federal law and California law guarantee that a defendant has the right of "allocution," the right of a defendant to directly address the sentencing body before judgment is pronounced. Fed. Rules Crim. Pro. 32(a)(1); California Penal Code §1200. Under the Federal Rules of Criminal Procedure, if a defendant is denied his right of allocution, the case is automatically reversed and sent back to the trial court for resentencing. See for example, *United States v. Gardner* (9th Cir. 1973) 480 F.2d 929.

This Court has long recognized the importance of that right.

> "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *Green v. United States* (1961) 365 U.S.424, 81 S.Ct. 653, 655

There is something very offensive in the notion that "timeliness" could prevent defendant, once he is convicted of a capital crime, from thereafter choosing to dispense with the unwanted assistance of counsel in the presentation of the defense regarding penalty. How can such a motion to proceed *in propria persona* made upon the conclusion of the guilt phase be "untimely" when it is made contemporaneously with the time that the need for penalty proceedings first becomes apparent? Consistent with *Faretta*, a defendant must have the right to personally address the men and women who will decide if he shall remain among the living.

While an attorney's training and experience will undoubtedly make him more skilled in the presentation of and objection to evidence as it relates to guilt or innocence than one unschooled in the niceties of the law, that advantage becomes less significant when the appeal that must be made is to that complicated matrix of value judgments and emotions that are the components of a juror's decision in the sentencing portion of a capital trial. Moreover, this Court has recognized that although,

> "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance...[p]ersonal liberties are not rooted in the law of averages...The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction."

Since this Court issued its opinion in *Faretta, supra*, in 1975, this Court has not directly spoken on the scope of the right to self representation.[8] There can be no more fundamental exercise of the right to self representation expounded by this Court in *Faretta* than when the question is whether or not the accused should live or die.

As this Court has observed,

> "[W]e recognize the defendant's right to defend pro se not primarily our of the belief that he thereby stands a better chance of winning his case, but rather out of deference to the axiomatic notion that each person is ultimately responsible for choosing his own fate, including his position before the law. A defendant has the moral right to stand alone in his hour of trial and to embrace the consequences of that course of action." *McKaskle v. Wiggins, supra*, 465 U.S. at 961 fn. 6, quoting from *Chapman v. United States* (5th Cir. 1977) 553 F.2d 886

In view of the reinstatement of the death penalty in numerous states within the past fifteen years, coupled with this Court's decision in *Faretta*, it is apparent that this issue will not go away. Ultimately, this Court will be called on to resolve this question. Petitioner made a timely motion to personally plead for his own life; he lost the motion and the jury sentenced him to death This Court should grant certiorari to resolve this fundamental question of constitutional law.

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[8] Except in *Mckaskle v. Wiggins* (1984)465 U.S. 168 which dealt with the issue of the role of advisory counsel.

III

THE INSTRUCTIONS OF THE TRIAL COURT COUPLED WITH THE PROSECUTION'S VOIR DIRE AND CLOSING ARGUMENT MISLED THE JURY CONCERNING THE DISCRETION IT HAD TO EXTEND LENIENCY BY INFORMING THE JURY THAT THEY HAD NO CHOICE BUT TO VOTE FOR THE DEATH PENALTY IF THE FACTORS IN AGGRAVATION OUTWEIGHED THOSE IN MITIGATION EVEN IF, UNDER THOSE CIRCUMSTANCES, THE JURORS STILL FELT THAT DEATH WAS NOT THE APPROPRIATE PUNISHMENT

Statement of Facts

At the conclusion of the penalty phase of appellant's trial, the jurors were instructed in the mandatory language of former CALJIC 8.84.2 that,

> "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you **shall** impose a sentence of death." [9] (emphasis added) (R.T. 4669)

During voir dire, the prosecutor told eleven out of twelve jurors who rendered verdicts in appellant's case that the law required that if they found that the aggravating factors outweighed those in mitigation they **must** vote for the death penalty. Moreover, each juror was then asked to promise the prosecutor that if the factors in aggravation outweighed those in mitigation, **they would impose the death penalty.** Naturally, when asked, they promised.

The questioning of juror Garfield Winters is illustrative. The prosecutor first explained that evidence in aggravation was evidence against the defendant and that evidence in mitigation was evidence that was favorable to the defendant. He then asked Mr. Winters,

> "Q. [Y]ou...understand that in your judgment, yours and the other jurors if the evidence against the defendant outweighs the evidence in favor of him, **there is no way around it**, then you have to bring back a verdict of death.
> A. Yes.
> Q. Is that your understanding?
> A. Yes.
> Q. Are you willing to do that if that's how it turns out?
> A. Yes." (R.T. 650) (emphasis added)

Similarly, the prosecutor told juror Sylvia Bania that the judge

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[9] The jurors were also instructed that, "in weighing the aggravating and mitigating factors, you are not to merely count numbers on either side. You are instructed rather to weigh and consider the factors on each side as a whole" (R.T.4664)

"Q. ...will also instruct you that in the event the evidence in aggravation outweighs the evidence in mitigation, that you must bring back a verdict of death?
A. Yes.
Q. All right. In other words, the standard is set, then.
A. Yes
Q. In other words, if you find one of those, **you are bound to that verdict?**
A. Right. (R.T. 1200-1201)"[10]

All the jurors so asked gave the prosecutor their solemn assurance that they would follow the mandatory sentencing scheme as outlined by the prosecutor; they told him that it was understood that they had no choice but to impose the death penalty if they found that the aggravating circumstances outweighed those in mitigation.

Most significantly, neither the judge nor the defense attorney at any time suggested that the jurors' obligation was anything different from that which the prosecutor stated.

Given the mandatory sentencing catechism that occurred during voir dire, when it came to closing argument, it was unnecessary for the prosecution to engage in any extended discussion of the meaning of CALJIC 8.84.2; all the prosecutor had to do was to remind the jurors of the assurances previously given during voir dire to reactivate their promises to adhere to the prosecutor's unconstitutional mandatory sentencing formula.

> "Now remember at the time of the voir dire you all promised that in the event that this case went- to a penalty phase and the aggravation evidence outweighed the mitigation evidence, you would impose the death penalty. Well, that is the case here, and now is the time. You should not let sympathy for the defendant or his family affect your deliberations." (R.T. 4642)

Significantly, at no time during his closing argument did the prosecutor ever suggest to the jurors that their job was not to mechanically impose the death penalty, but, rather, after the weighing process was concluded, to determine if death was the appropriate punishment. Far from correcting, or in any way modifying the mandatory language of CALJIC 8.84.2, **every time** the

[10] A similar promises were extracted from all the other jurors except Henry Berry Jr. who was the first to be voir dired of those eventually selected: David Bergman (R.T. 879:1), Orlow Garrett (R.T. 1435:17), Jose Leal (R.T. 1247:23), Dathelma McNaught-Davis (R.T. 484:11), Ronald Orton (R.T. 1518:16), Kimberly Otto (R.T.740:1), Martha Penny (R.T. 1477:25), Louis Perez (670:8), and Sandra Sheffield (R.T. 750:20).

prosecutor touched upon the subject of the jury's sentencing responsibilities, the prosecutor exploited that mandatory language and hammered away at one insistent theme: if aggravation outweighed mitigation, then it was the jury's legal obligation to impose the death penalty.

At the outset, the prosecutor told the jury that their task was to,

> "consider evidence from both the guilt phase and the penalty phase to determine whether or not the aggravation outweighs the mitigation." (R.T. 4621)

Later on, he told the jury that imposition of the death penalty was a foregone conclusion because of the overwhelming nature of the aggravating evidence.

> "How about all the terror she went through during the perpetration of that robbery and kidnapping before she was finally slaughtered. Right there we could stop. There is more than enough aggravation to inflict the death penalty, because right there it outweighs whatever they could put into mitigation." (R.T. 4623-4624)

Again he told the jury that if aggravation outweighed mitigation, their job was to impose the death penalty.

> "So, ladies and gentlemen, you are the ones who have to add up and come to the total, how does the alleged mitigation stack up against the overwhelming aggravation. In Latin there is a phrase nolo contendere. Do you know what that means? No contest. And that is exactly what it is." (R.T. 4641)

Finally, as indicated *supra*, the prosecutor recalled the jurors' promise to impose the death penalty if the aggravating factors outweighed the mitigating factors.

> "Well, that is the case here, and now is the time. You should not let sympathy for the defendant or his family affect your deliberations." (R.T. 4642)

The prosecutor reminded the jurors of their commitment to vote for the death penalty, as though they were delegates to a political convention, and he was the candidate's floor manager calling in his markers.

B

Petitioner's Death Sentence was Imposed in violation of the Eighth Amendment to the United States Constitution because the jury was misled into thinking that it had no choice but to impose that penalty

if the factors in aggravation outweighed those in mitigation even if it still believed, under those circumstances, that death was not the appropriate punishment.

It is the cornerstone of capital punishment jurisprudence that, "'the penalty of death is qualitatively different' from any other sentence," and as such, "the Eighth and Fourteenth Amendments require that the sentencer...not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that he defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio* (1978) 438 U.S. 586, 604

To ensure constitutionally mandated fairness in the capital sentencing process, this Court has required great certainty that a jury's sentencing conclusion was based upon proper grounds and was not the product of even arguable confusion about the meaning of jury instructions, the prosecutor's penalty phase argument, or both. *Mills v. Maryland* (1988) __U.S.__, 56 U.S. Law Week. 4503, *California v. Brown* (1987) __U.S.__, 107 S.Ct. 837

In *California v. Brown, supra*, four members of this Court (Justices Brennan, Marshall, Blackmun, and Stevens), wrote that CALJIC 8.84.2 (given in petitioner's case) did not provide the constitutionally required assurance that the jury was fully aware of its sentencing discretion. Justice O'Connor's concurring opinion suggested that the effect of the unmodified CALJIC 8.84.2 instruction, when combined with a prosecutor's closing argument that further misinformed or misled the sentencing jury about the substance of the capital sentencing determination, would violate Eighth Amendment standards and require that the penalty verdict be vacated.

Moreover, the California Supreme Court itself has expressed concern that CALJIC 8.84.2 might be misinterpreted. In *People v. Myers* (1987) 43 Cal.3d 250, the court explained that,

> "[W]e were concerned in *Brown* that the unadorned instruction's phrase, 'the trier of fact...*shall* impose a sentence of death if [it] concludes that the aggravating circumstances outweigh the mitigating circumstances' (emphasis added),

> could mislead the jury as to the ultimate question it was called on to answer in determining which sentence to impose. Although the quoted phrase could be understood to require a juror (i) to determine whether 'the aggravating circumstances outweigh the mitigating circumstances' without regard to the juror's personal views as to the appropriate sentence, and then (ii) to impose a sentence of death if aggravation outweighs mitigation even if the juror does not personally believe that death is the appropriate sentence under all the circumstances, we concluded in *Brown* that the statute was not intended to, and should not, be interpreted in that fashion. Instead we stated: 'By directing that the jury "shall" impose the death penalty if it finds that aggravating factors "outweigh" mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the weighing process, *he decides that death is the appropriate penalty under all the circumstances.*"

In petitioner's case, the jurors were never instructed that after the weighing process was complete, they must, "decide[] that death is the appropriate penalty under all the circumstances." As a consequence, the jurors in petitioner's case were both told by the prosecutor in voir *dire*, instructed by the court that once they found that aggravating factors outweighed those in mitigation, their job was complete and their discretion was at an end, even if they still thought, all things considered, that death was an inappropriate punishment in this case.

Clearly, the mandatory sentencing formula applied in petitioners case did, "not permit the type of individualized consideration of mitigating factors...required by the Eighth and Fourteenth Amendments in capital cases." *Lockett, supra*, 438 U.S. at 605

C.

Why this Court should grant Certiorari.

When taken in toto, the prosecutor's elicitation of promises from eleven out of twelve jurors in*voir dire* to impose the death penalty if aggravation outweighed mitigation, even if they still felt that death was inappropriate, the prosecutor's closing remarks reminding the jurors of their promise and demanding that they honor it and the court's instruction that the jury **shall** impose the death penalty if aggravation outweighed mitigation effectively robbed

the jury in petitioner's case of "the individualized consideration...required by the Eighth and Fourteenth Amendments in capital cases."

This Court has already granted certiorari in a case raising similar issues concerning the impact of improper instruction on the law during *voir dire*. *Adams v. Dugger* (11th Cir. 1987) 816 F.2d 1493, *cert. granted* (1988) 108 S.Ct.1106 Petitioner's case should be held until the decision in the *Adams* case so that petitioner may have the benefit of the Court's ruling in that case.

Dated: October 21, 1988

BARRY L. MORRIS
Attorney for Petitioner
BERNARD LEE HAMILTON

88-5746

(3)

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BERNARD LEE HAMILTON, *Petitioner*

vs.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

Appendix

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Attorney for Petitioner
BERNARD LEE HAMILTON

Opinion of the California Supreme Court

[Crim. No. 21959. May 19, 1988.]

THE PEOPLE, Plaintiff and Respondent, v.
BERNARD LEE HAMILTON, Defendant and Appellant.

[Crim. Nos. 25303, S001870. May 19, 1988.]

In re BERNARD LEE HAMILTON on Habeas Corpus.

SUMMARY

Defendant was convicted of first degree murder (Pen. Code, § 187), kidnapping (Pen. Code, § 207), robbery (Pen. Code, § 211), and burglary (Pen. Code, § 459). He was found to have committed the murder in the course of robbery (Pen. Code, § 190.2, subd. (a)(17)(i)), kidnapping (§ 190.2, subd. (a)(17)(ii)), and burglary (§ 192, subd. (a)(17)(vii)). He was sentenced to death. (Superior Court of San Diego County, No. 47283, Franklin B. Orfield, Judge.)

On remand from the United States Supreme Court, following its vacation of the previous judgment which had reversed the death penalty for failure of the trial court to instruct that intent to kill was an element of the felony-murder special circumstances, the Supreme Court affirmed the judgment in its entirety, and denied two petitions for habeas corpus. The court held the cause in its entirety was properly before it, and adopted its prior decision dealing with guilt issues as its decision in the proceeding. It further held the trial court did not err in failing to instruct the jury that intent to kill was an element of the felony-murder special circumstance, and thus did not reach the issue, the subject of the United States Supreme Court's remand order, of whether a failure to instruct on intent was subject to harmless-error analysis. The court held that the trial court did not abuse its discretion in denying defendant's motion to represent himself which was made in the midst of the jury's guilt phase deliberations. It also held that under the circumstances of the case and in view of the whole record defendant was not prejudiced by potentially misleading instructions pertaining to the jury's sentencing responsibility and discretion. The court held that although the trial court erred in giving a so-called Briggs instruction relating to the Governor's commutation and pardon power, the error was not prejudicial in view of the

trial court's subsequent instructions and admonitions not to make any use of the instruction in determining the penalty to be imposed on defendant. On the habeas corpus petitions, the court held defendant failed to show he was denied effective representation of counsel, and also rejected his claim the prosecution interfered with his attempt to obtain evidence. (Opinion by Mosk, J., with Lucas, C. J., Panelli, Arguelles, Eagleson, and Kaufman, JJ., concurring. Separate concurring and dissenting opinion by Broussard, J.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Courts § 33—Decisions and Orders—Law of the Case—Supreme Court Vacation of Judgment Remand.**—Where, in a death penalty case, the United States Supreme Court granted the California Attorney General's petition for certiorari on a particular issue, vacated the judgment, and remanded to the California Supreme Court for further proceedings, the decision was rendered a nullity and as such had no binding force. The cause in its entirety was then before the California Supreme Court. Accordingly, the doctrine of law of the case did not bar reconsideration of any point decided in the first case. The doctrine may be applied only when and to the extent the prior decision had binding force.

(2) **Homicide § 70—Instructions—Nature and Elements of Offense—Intent to Kill—Special Circumstances—Felony Murder.**—In a capital murder prosecution, the trial court did not err in failing to instruct the jury that intent to kill was an element of the felony-murder special circumstance, where all the evidence showed that defendant either actually killed the victim or was not involved in the crime at all, and there was no evidence that he was an aider and abettor. An instruction on intent to kill is only required when there is evidence from which the jury could find that the defendant was an aider and abettor rather than the actual killer.

(3a, 3b) **Criminal Law § 87.2—Rights of Accused—Aid of Counsel—Self-representation—Timeliness of Motion—Capital Case.**—In a death penalty case, defendant's motion to represent himself, filed in the midst of the jury's guilt phase deliberations, was not timely for purposes of invoking the absolute right of self-representation. The penalty phase could not be considered a separate trial for purposes of the motion. The penalty phase has no separate formal existence but is

merely a stage in a unitary capital trial. Moreover, the connection between the phases of a capital trial is substantial and not merely formal.

(4) **Criminal Law § 87.2—Rights of Accused—Aid of Counsel—Self-representation—Denial of Motion—Discretion.**—The trial court in a capital case did not abuse its discretion in denying defendant's untimely motion to represent himself, where, although the court considered irrelevant factors such as defendant's inability "to roam around the courtroom" in shackles and his lack of competence in law, it nevertheless made a reasonable determination, after considering the proper factors, that defendant should not be permitted to represent himself at the penalty phase of the trial.

(5) **Homicide § 101—Punishment—Death Penalty—Sentencing Formula.**—The sentencing formula of Pen. Code, § 190.3, is not unconstitutional on the asserted ground that it withdraws from the trier of fact constitutionally compelled discretion and thereby undermines the reliability of the verdict.

(6) **Criminal Law § 523—Punishment—Penalty Trial—Instructions—Mandatory Sentencing Language.**—In the penalty phase of a capital case, an instruction incorporating the mandatory sentencing language of Pen. Code, § 190.3, did not mislead the jurors to defendant's prejudice as to the scope of their sentencing responsibility and discretion in violation of constitutional principles. Although in closing argument the prosecutor referred briefly to the mandatory sentencing language, he clearly acknowledged the jurors' discretion and their individual responsibility. In his closing argument defense counsel emphasized it was the sole responsibility of the jurors to determine whether the death penalty was appropriate for defendant. Also, at defendant's request the court instructed the jurors on their proper function in weighing aggravating and mitigating factors.

[See Cal.Jur.3d (Rev), Criminal Law, § 3345; Am.Jur.2d, Homicide, § 555.]

(7) **Criminal Law § 523—Punishment—Penalty Trial—Instructions—Mitigating Factors.**—In the penalty phase of a capital case, a potentially misleading instruction on what the jury could consider in mitigation did not mislead the jury to defendant's prejudice. The jurors were in fact adequately informed that they could consider character and background evidence. After the defense presented a case that consisted entirely of such evidence, the court instructed the jurors that they

should not limit their consideration of mitigating circumstances to the specific statutory factors, but should consider any other circumstances presented as reasons for not imposing the death sentence.

(8) **Criminal Law § 523—Punishment—Penalty Trial—Instructions—Re Governor's Power to Commute or Modify.**—In the penalty phase of a capital case, the trial court erred in instructing the jury as to the Governor's commutation and pardon powers as to life sentences (Briggs instruction), and the error was not cured by a supplementary instruction that did not alter the objectionable language which continued to mislead and to invite speculation on irrelevant and improper matters. However, the error was not prejudicial, in view of the court's direction to the jurors not to make any use of the erroneous instruction in determining the penalty to be imposed on defendant. Jurors are presumed to follow the instructions given by the court. A brief and isolated comment by the prosecutor that defendant would spend his time in prison devising ways to manipulate the system and get out could not be understood to refer to the erroneous instruction. The remark did not even allude to the commutation power.

(9) **Criminal Law § 521—Punishment—Penalty Trial—Evidence—Invalid Special Circumstance.**—Even if one of three felony-murder special circumstances was invalid and improperly presented to the jury as evidence in aggravation in a capital case, no reversible error occurred, in view of the overwhelming evidence in aggravation and the minimal evidence in mitigation.

(10) **Homicide § 97—Verdict, Sentence, and Punishment—Capital Case—Power to Strike Special Circumstance Findings.**—Pen. Code, § 1385, authorizes the trial court to dismiss "in furtherance of justice" in any circumstance in which the legislative body has not clearly manifested a contrary intent. Thus, under the 1978 death penalty law, the trial court in a capital case had the authority to strike the special circumstance findings pursuant to § 1385.

(11) **Homicide § 101—Punishment—Death Penalty—Validity.**—Where, in view of the theories presented and the evidence introduced, the jury's guilt phase verdicts in a capital trial implied a finding that defendant was the actual killer, and where that finding was amply supported by the evidence, the imposition of the penalty of death on defendant did not violate U.S. Const., 8th Amend.

(12) **Criminal Law § 104—Rights of Accused—Competence of Defense Counsel—Burden of Proof.**—In order to establish a claim of

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ineffective assistance of counsel, a defendant must show that counsel performed at a level below an objective standard of reasonableness under prevailing professional norms; and thereby subjected the defense to prejudice, that is, in the absence of counsel's failings a more favorable outcome was reasonably probable.

(13) **Criminal Law § 104—Rights of Accused—Competence of Defense Counsel—Burden of Proof—Allegations.**—On appeal from a capital conviction, allegations by defendant that trial counsel made various errors in strategy and tactics and that they feared defendant and treated him with distrust, and that appellate counsel refused to argue that facial expressions and gestures trial counsel assertedly made during jury selection prejudiced the defense, failed to effectively allege either deficient performance or prejudice.

(14) **Criminal Law § 233—Trial—Power and Conduct of Judge—Bias.**—When the state of mind of the trial judge in a criminal trial appears to be adverse to one of the parties but is based on actual observance of the witnesses and evidence given during the trial of the action, it does not amount to prejudice.

(15) **Criminal Law § 48—Rights of Accused—Fair Trial—Presence at Trial—Scheduling Hearing.**—A defendant charged with capital crimes was not entitled to be present at a pretrial hearing to establish a schedule under which a defense criminologist would examine a vehicle involved in the murder. An accused is not entitled to be personally present on matters in which his presence does not bear a reasonably substantial relation to the fullness of his opportunity to defend against the charge. Defendant's attendance at what was essentially a scheduling hearing would not have been useful or of benefit to the defense.

(16) **Criminal Law § 45—Rights of Accused—Fair Trial—Distortion or Suppression of Evidence.**—A capital defendant's claim on habeas corpus that the prosecution interfered with his attempt to obtain evidence by having a van involved in the murder examined and cleaned before the defense criminologist could subject it to inspection and tests failed to adequately allege interference, where it did not state that the criminologist acted without undue delay or that the delay on his part was attributable to the prosecution.

COUNSEL

Barry L. Morris, under appointment by the Supreme Court, for Defendant, Appellant and Petitioner.

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John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, Harley D. Mayfield, Assistant Attorney General, Jay M. Bloom, John W. Carney, Michael D. Wellington and Pat Zaharopoulos, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

MOSK, J.—The cause in Crim. 21958 is before us on remand from the United States Supreme Court. It was last here on automatic appeal from a judgment of death. (Pen. Code, § 1239, subd. (b).) Defendant was convicted of first degree murder (*id.*, § 187), kidnapping (*id.*, § 207), robbery (*id.*, § 211), and burglary (*id.*, § 459). He was found to have committed the murder in the course of robbery (*id.*, § 190.2, subd. (a)(17)(i)), kidnapping (*id.*, subd. (a)(17)(ii)), and burglary (*id.*, subd. (a)(17)(vii)). He admitted that he had previously suffered convictions for forgery (*id.*, § 470) and for two counts of burglary (*id.*, § 459). He was sentenced to death.

When the cause was previously before us we held there was no reversible error at the guilt phase of the trial, but that under the general rule of automatic reversal of *People* v. *Garcia* (1984) 36 Cal.3d 539 [205 Cal.Rptr. 265, 684 P.2d 826], the court's failure to instruct in accordance with *Carlos* v. *Superior Court* (1983) 35 Cal.3d 131 [197 Cal.Rptr. 79, 672 P.2d 862], that intent to kill was an element of the felony-murder special circumstances, required the setting aside of the special circumstance findings and hence the reversal of the judgment of death. (*People* v. *Hamilton* (1985) 41 Cal.3d 408 [221 Cal.Rptr. 902, 710 P.2d 981] [*Hamilton I*].)

After seeking rehearing in this court without success, the Attorney General petitioned the United States Supreme Court for a writ of certiorari. The court granted the petition, ordered our judgment vacated, and remanded the cause for reconsideration in light of its decision in *Ruse* v. *Clark* (1986) 478 U.S. 570 [92 L.Ed.2d 460, 106 S.Ct. 3101].

Subsequently, defendant in propria persona filed two petitions for writ of habeas corpus. (Crim. 25303 and S001870.) We consolidate the cause in Crim. 21958 and the proceedings in Crim. 25303 and S001870 for purposes of decision.

As we shall explain, we conclude, as we concluded in *Hamilton I*, that the judgment must be affirmed as to guilt. Contrary to our determination in *Hamilton I*, we now conclude that the special circumstance findings must be upheld: under *People* v. *Anderson* (1987) 43 Cal.3d 1104, 1147 [240

Cal.Rptr. 585, 742 P.2d 1306], the court was not obligated to instruct on intent to kill with regard to the special circumstances here; and defendant does not present any other ground for setting aside the findings. We also conclude that the judgment must be affirmed as to penalty. Finally, we conclude that the petitions for writ of habeas corpus must be denied.

I. DIRECT APPEAL (CRIM. 21958)

A. *The Facts*

The facts of this case, which appear in *Hamilton I* at pages 413 to 419 of 41 Cal.3d, are relevant to our decision and are accordingly quoted in extenso below:

"The evidence presented in the prosecution's case-in-chief tells the following tale: 'On May 31, 1979, about 1 p.m., the body of Eleanore Frances Buchanan was discovered in the grass near a cul-de-sac off Pine Valley Road, near San Diego. Harry Piper noticed it while walking back to his car from target shooting. The body had no head or hands and was clothed only in a bra, underpants and socks.

"'The body appeared to be in full rigor mortis when a deputy sheriff arrived at the scene between 1:30 and 2 p.m. Two strings of white cord were tied around the ankles, and there were dark blue fibers sticking to some blood on the body. There were marks on the wrists indicating that they had been tied together. A search of the area revealed no clothing or anything else that could be associated with the victim.

"'Dr. Luibel, who performed the autopsy, was unable to determine the cause of death because of the absence of the head. (The head and hands have never been found.) He could, however, rule out natural causes. There were three long superficial incisions on the abdomen that appeared to have been inflicted after death. There was a horizontal stab wound on the abdomen that had probably been inflicted before death, but it did not penetrate the stomach or intestines. The right hand appeared to have been sawed off and the left one cut off with a knife. The head was probably removed by using both a knife and saw. Dr. Luibel could not say whether the victim was alive or dead when her head was cut off. The small amount of hemorrhage at the wrists suggested the victim was probably dead when her hands were cut off. The body was still in full rigor mortis at 4 p.m. on May 31, 1979, when Dr. Luibel examined it. Death would have occurred about 16 hours before then—about midnight the night before.

"'Terry Buchanan, the victim's husband, testified that his wife had given birth to a baby boy three weeks before her death and that she was still

nursing him on May 30, 1979. That day Mrs. Buchanan left the house about 6:30 p.m. to go to a math class at Mesa College from 7 to 10 p.m. She was wearing tan levis, a beige and brown T-shirt, and was carrying a brown simulated leather purse. Mrs. Buchanan drove the family's only vehicle—a new blue van. There was very little gas in the tank because Buchanan planned to have the tank replaced the next day. Since Buchanan used the van during the day for his dental supply sales work, the van contained dental equipment and supplies. Buchanan said his wife was very security conscious and customarily locked the van. He also said that everything in the van was in good condition when she left.

"Mrs. Buchanan was last seen alive walking toward the parking lot from her math class about 9:30 p.m. Fellow students had given her copies of class notes for the classes she had missed because of the birth of her baby. Mrs. Buchanan had left class a little early because an optional quiz was given at 9:30 p.m.

"At 1:52 a.m. (California time) on May 31, 1979, defendant called his girlfriend, Donna Hatch, in Terrell, Texas from his parents' home in San Diego. He told Donna that he had a van and was planning to leave for Texas as soon as the gas stations opened in the morning.

"There was a gasoline shortage at the time, and gas stations were only open for limited hours. Between 4:45 a.m. and 10:15 a.m. on May 31, 1979, defendant used Terry and Eleanore Buchanan's Visa card to buy gas in El Cajon, California. The card was used two more times that day to buy gas for the van—once in El Centro, California at a station that was open between 6 a.m. and 10 a.m., and once in Tucson, Arizona.

"When defendant arrived at Donna Hatch's home in Terrell, Texas on the evening of June 1, 1979, the van was dirty, had a broken arm on the driver's chair, a broken mirror, and a broken wing window on the passenger side. Defendant took Donna with him on errands in the van on June 1, 2 and 3, 1979. Donna saw some credit cards in the name of Terry and Eleanore Buchanan in the compartment between the seats. Defendant used the credit cards to buy gas and food while Donna was with him.

"On June 3, while Donna was in the van with defendant and her daughter, they saw a highway patrolman. When Donna turned back to talk to her daughter, defendant told her not to make any sudden moves because they could get shot. Later, defendant stopped at a pay phone to call his brother and his friend Clifford. Donna heard defendant tell his brother he had flown to Texas. Clifford testified that when defendant called him, he was watching a report on TV that the body of a white woman with her head and hands

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cut off had been found; he told defendant about it. Defendant seemed nervous when he returned from talking to Clifford. He told Donna that he thought he had killed a man, but he did not want to tell her any details because she might not want to have anything to do with him if he told her. Defendant said he would let the van sit a while to see if anybody paid attention to it. He also said he needed some Texas license plates. He asked Donna to go with him to a car lot, but she refused.

"Donna broke up with defendant the next day. Defendant said that if Donna were upset about the fact that he had lied about his ex-wife being dead, he would kill his ex-wife. On June 6, defendant called Donna to discuss bringing her back to California to testify for him in a pending case. At one point, a friend of Donna's got on the phone. Defendant told Donna, 'I'm going to kill you and your friend, too. And you won't know when I'll be around because I don't have to be driving this van, I can be in another vehicle.' Donna never saw or talked to defendant after that phone call.

"Defendant continued using the Buchanans' credit cards to buy gas, food and other items. It was stipulated that on June 6 defendant charged a saw, screwdriver and set of wrenches at a local store, and on June 7, he bought a butcher knife and two skeins of twine at a variety store.

"While driving the van in Oklahoma on June 8, 1979, defendant was stopped by a deputy sheriff. The deputy ran a check of the van's VIN number and learned that it belonged to the homicide victim. Defendant was arrested and taken to jail. On the way to the jail he passed a poster offering a reward for David L. Wall, alias 'Spider.'

"On June 9, 1979, San Diego sheriff's deputies interviewed defendant in Oklahoma. They began by introducing themselves, saying that they had come to talk to defendant about the van. Defendant interrupted them, stating: 'Yeah, the guy told me yesterday, one that pulled the gun on me, that it had been involved in a homicide, and uh . . . .' Defendant was then advised of his *Miranda* rights, which he waived. Defendant told the deputies he had left San Diego in the van with Spider and Fran, a white woman who had left her husband for Spider. Spider's real name was Calvin Spencer. Fran and Spider were presently in Shreveport, Louisiana. They had given defendant the van and credit cards when he had said he did not want to stay in Louisiana. Defendant was shown a picture of Eleanore Buchanan with her baby. He said it looked like Fran, but Fran was a little skinnier.[1]

[1]At this point the opinion notes: "Fran was Eleanore Buchanan's nickname. It was on the school papers she had been carrying and on an unmailed birth announcement that had been in her purse." (45 Cal.3d at p. 416, fn. 2.)

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Defendant said 'the only time I seen her' Fran was wearing light colored jeans and carrying a beige nonleather purse.

"Enroute to San Diego, defendant was disturbed about his arrest for murder and kept saying it was not going to stick because all the police had was a body they could not identify and a runaway wife."[6]

"Shortly after defendant's preliminary hearing, Terry Buchanan received a letter with defendant's county jail return address. It said, 'You are probably full of grief when you should be highly pissed-off . . .' because Fran was not dead but had left with Spider and was smoking Sherman Sticks. Buchanan turned the letter over to the district attorney's office.

"Steven Thomas, an inmate at the San Diego County jail, testified that on January 24, 1980, he had a conversation with defendant about his case. He asked defendant, 'Who are you trying to convince, Hamilton, me or yourself?' Defendant replied, 'Well, I did it but they'll never prove it.' Thomas reported the conversation to the guard. Thomas had been convicted of murder, robbery, forgery, burglary and escape. Thomas testified he was in the federal witness protection program against organized crime, but had not received any money from the United States with respect to that program.

"While transporting defendant between the jail and courtroom on August 21, 1979, Deputy Sheriff Parsons was tightening defendant's security chains. Defendant said, 'All right, you have your fun, I'll have mine later.' Parsons responded, 'I thought you already had your fun.' Defendant replied, 'Yeah, and I'll kill a lot more, too, and you may be first on my list.'

"Brandon Armstrong, a criminalist, testified that the blue fibers that had been on the victim's body could easily have come from the carpet in the victim's van. Blood on the carpet in the van matched the type and characteristics of the victim. Several hairs found in the carpet stains could have been hers. Armstrong also examined blood found on defendant's shoe and concluded that it had been smeared on when wet. The blood on defendant's shoe was type O—the victim's type.[7] Defendant's type was A.

"A questioned documents expert testified that defendant was the person who had signed Terry Buchanan's name to the credit card invoices." (41 Cal.3d at pp. 413-417.)

[6] At this point the opinion notes: "The body was, in fact, quickly identified by a number of distinctive features, which included moles, toenail polish, scars, recent ejaculation, and the nursing bra." (41 Cal.3d at p. 416, fn. 3.)

[7] At this point the opinion notes: "Armstrong testified on rebuttal that the blood on defendant's shoe could not have come from rubbing against the blood on the van's carpet." (41 Cal.3d at p. 417, fn. 4.)

The defense case was as follows. "Defendant's mother testified that he was at her house between 8 and 9 p.m. on May 30, 1979. She said that although she testified at the preliminary hearing that she did not remember seeing defendant on the evening of May 30, 1979, she later spoke to defendant who refreshed her recollection by reminding her of some things that had happened that evening.[8]

"Mary Brewer, a relative of defendant's who lived in Oklahoma City, testified that defendant had visited her in the early part of June 1979. He gave her a ride in the van, and she did not remember seeing any blood in it.

"Defendant testified that he had never seen the victim alive or dead. He said he went to his sister-in-law's house after he left his parent's house about 9 p.m. on May 30, 1979. He saw the Buchanans' van parked on a street between 12:45 and 1 a.m. on May 31, 1979, while walking home from a 7-Eleven store after talking to Butch McIntyre.[9] The keys were in the ignition, the wing wind; w was broken, and a purse was on the passenger seat. Defendant drove the van home, called Donna Hatch, put his clothes in it and left for Texas shortly before sunrise. Defendant said he broke the armrest on the driver's seat when he was moving from the passenger seat to the driver's seat. (The seats were swivel chairs with armrests.)

"Defendant explained that he had told the officers in Oklahoma that he had driven across the country with Spider and Fran because he did not want to get stuck with an auto theft charge.

"Defendant denied having threatened to kill Donna Hatch. He said he bought the saw and other items on June 6 before he spoke to Donna Hatch. He planned to use them to burglarize a store in Terrell. Defendant said he was attempting to distract Donna when he told her he thought he had killed someone; she was angry at him because she had just found out he had lied about his ex-wife being dead.

"David Faulkner, an entomologist, testified about an experiment he had conducted in an attempt to determine when the victim's body had been left at the cul-de-sac. Faulkner took a rabbit, with its head and forepaws severed, and at midnight put it where the victim had been found. The purpose was to determine the amount of insect activity that would occur. Faulkner

[8] At this point the opinion notes: "Defendant had written two letters to Donna Hatch after her preliminary hearing testimony attempting to refresh her recollection as to events that involved her." (41 Cal.3d at p. 417, fn. 5.)

[9] At this point the opinion notes: "McIntyre testified he saw defendant after watching the NBA game on TV. There had, however, been no game on May 30. There had been one on May 29, 1979." (41 Cal.3d at p. 418, fn. 6.)

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testified that within a few hours of sunrise there were a lot of flies around the rabbit. Based on this experiment and his knowledge of the temperature on the morning of May 31, 1979, Faulkner concluded that the earliest the body would have been put there would have been 9 a.m. Faulkner admitted, however, that there is a great deal of variation in the degree to which insects are attracted to different human bodies.

"Parker Bell, a criminalist, testified that the blood on defendant's shoe was a smear, as opposed to a droplet or splatter. He thought the blood could have come from the carpet, but he acknowledged that there were no blue fibers in the blood. (The blue carpet shed badly.) On cross-examination, however, Bell admitted it was possible that the blood could have been smeared on defendant's shoe by having bumped one of the victim's bloody stumps.

"Dr. Ali Hameli, Chief Medical Examiner of the State of Delaware, testified that in his opinion the victim died between 9:30 and 12 p.m. on May 30. Dr. Hameli also thought that rigor mortis was present when the body was placed at the cul-de-sac and that the body could have been put there no earlier than 4 a.m. on May 31.

"Allen Biggs testified that he had been at the cul-de-sac about 10 a.m. on May 31, 1979. He had seen Mr. Piper's car but no body. Deputy Sheriff Crawford testified that tire tracks at the scene in the cul-de-sac did not match the tire tracks of the victim's van.[*]" (41 Cal.3d at pp. 417-419.)

B. *Hamilton I*

In *Hamilton I*, we considered the issues going to guilt raised by defendant and concluded that none required reversal. (41 Cal.3d at pp. 419-431.) We also concluded that in violation of our decision in *Carlos* v. *Superior Court*, *supra*, 35 Cal.3d 131, the court failed to instruct the jury that intent to kill was an element of the felony-murder special circumstances. (41 Cal.3d at p. 431.) Further, we concluded that this error fell within the scope of the rule of automatic reversal laid down in *People* v. *Garcia*, *supra*, 36 Cal.3d 539, and outside the four narrow exceptions enunciated in that opinion. Specifically, we determined that only the so-called *Cantrell-Thornton* exception was potentially available (*People* v. *Cantrell* (1973) 8 Cal.3d 672 [105 Cal.Rptr. 792, 504 P.2d 1256]; *People* v. *Thornton* (1974) 11 Cal.3d 738 [114 Cal.Rptr. 467, 523 P.2d 267])—viz., that intent to kill was established as a matter of law and there was no contrary evidence worthy of consider-

[*]At this point the opinion notes: "Crawford had testified for the prosecution and had identified photos that showed drag marks from the roadway to where the body had been found. The drag marks appeared to start on the pavement." (41 Cal.3d at p. 419, fn. 7.)

ation. We then determined that the evidence adduced at trial showed that the exception was in fact not available here. Accordingly, we vacated the special circumstance findings and reversed the judgment as to penalty.

Thereupon the Attorney General filed his petition for a writ of certiorari on the issue whether the failure to instruct on intent to kill with regard to a felony-murder special circumstance is subject to harmless-error analysis. The high court granted the petition, vacated the judgment in *Hamilton I*, and remanded the cause to this court for further consideration in light of its decision in *Rose* v. *Clark*, *supra*, 478 U.S. 570 [92 L.Ed.2d 460, 106 S.Ct. 3101].

C. *The Cause on Remand*

At the threshold, we must delineate the scope of review on remand.

(1) Contrary to the parties' assumption, the cause in its entirety is properly before us. This is so because the United States Supreme Court vacated the judgment in *Hamilton I* and rendered the decision a nullity. Also contrary to the parties' assumption, the doctrine of law of the case does not bar reconsideration of any point decided in *Hamilton I*. The doctrine may be applied only when and to the extent the prior decision has binding force. (See *City of Oakland* v. *Oakland W. Etc. Co.* (1912) 162 Cal. 675, 677-678 [124 P. 251] [prior decision binding on points concurred in by the requisite number of judges, not binding on others].) Because the judgment in *Hamilton I* was vacated, that decision, of course, is a nullity and as such has no binding force.

1. *Guilt Issues*

Pursuant to the mandate of the United States Supreme Court referred to above, we have reexamined that part of our former opinion dealing with the issues relating to guilt. (*Hamilton I*, *supra*, 41 Cal.3d at pp. 419-431.) Inasmuch as we deem it unnecessary to alter or amend our prior decision in that regard, we adopt it as our decision in this proceeding.

2. *Special Circumstance Issues*

(2) Renewing the point he made in *Hamilton*, defendant contends the court erred by failing to instruct the jury that intent to kill was an element of the felony-murder special circumstance. The claim must be rejected.

In *People* v. *Anderson*, *supra*, 43 Cal.3d at page 1147, we held that the court must instruct on intent when there is evidence from which the jury

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could find that the defendant was an aider and abettor rather than the actual killer. In this case, of course, all the evidence showed that defendant either actually killed Buchanan or was not involved in the crime at all; there was no evidence that he was an aider and abettor. Thus, the court did not err by failing to instruct on intent.

Since we have concluded that the court was not obligated to instruct on intent, we are not required to reach the issue to which the high court's remand order directed us—i.e., whether the failure to instruct on intent is subject to harmless-error analysis—and accordingly decline to do so.[7]

3. *Penalty issues*

At the penalty phase the prosecution presented evidence to show that defendant, who was 29 years of age at the time of trial in 1981, had been involved in serious criminal activity virtually all his adult life. It was stipulated that defendant had suffered felony convictions for the following offenses: a 1971 forgery, two 1972 burglaries, a 1976 auto theft, and a 1976 Louisiana burglary.

The prosecution presented evidence that defendant robbed one Ruth Story on November 17, 1976. On that date, Story was about 55 years old and walked with a cane. As she was returning home from a store, she encountered a man and woman whom she did not know. The man knocked her to the ground and attempted to take her purse from her shoulder; she tried to get up, he pulled her into the street; she again tried to get up, he again knocked her to the ground and then pulled her onto the sidewalk, took her purse, struck her three times in the face with his fist causing serious injuries, and thereupon fled with his woman companion.

While he was in custody in Louisiana for his 1976 burglary, defendant wrote to Officer Patrick Birse of the San Diego Police Department. In his letter he complained that the Louisiana authorities had "railroaded" him and were subjecting him to physical abuse; stated that he wished to return to the San Diego area, confessed to the Story robbery, and requested that Birse urge the district attorney to have him extradited.

Subsequently, the San Diego police showed Story a photographic lineup in which defendant's picture appeared. Story identified defendant as the

[7] Defendant also contends the felony-murder-burglary special-circumstance finding must be set aside on the ground that the death penalty law does not include the burglary of a vehicle within the scope of this special circumstance. Because he has failed to show that the other special circumstance findings are invalid on any ground, defendant is properly death-eligible. (Pen. Code, § 190.2, subd. (a).) Hence, we need not reach this issue.

perpetrator, stating she was "about 80 percent certain." At a live lineup, however, Story failed to identify defendant as the perpetrator. She similarly failed to identify him at the preliminary hearing. Nevertheless, defendant was held to answer.

Not long after the preliminary hearing, defendant wrote to Story. In his letter he stated, "I know you don't know me personally, but I am the man accused in that November 1976 incident where you were robbed and hurt." He then said that he had made the confession in his letter to Officer Birse solely to be extradited from Louisiana, and that the confession was not true. Finally, he asked her help in clearing him of the robbery charge.

A few days later, defendant wrote to the San Diego District Attorney. In his letter, he said that he had made his confession as a result of coercion and was innocent of the robbery charge, and that it was in the office's best interests to dismiss the case. He added: "Your victim definitely knows me Personally and intimately. Back in 1967-68 and '69, when I was just a young buck, she used to pay me for my sexual services. . . . She is an alcoholic and sex freak, which is no crime, but the fact is, she knows me and would therefore would [sic] know if I was the one who robbed her, of [sic] which she has already said I wasn't."

At the penalty phase, Story identified defendant as her assailant. She stated: "The way [defendant] sets his mouth looks very much the same as the man set his mouth when he hit me."

The prosecution called one Ronie Blackmon to prove that she had twice suffered battery at defendant's hands. Blackmon testified that from late 1978 to early 1979 she and defendant were lovers; she worked driving a taxi cab, and was studying to become a truck driver; the pair discussed marriage, but defendant stated he did not want his wife to drive trucks; one morning in February 1979, defendant prevented her from going to truck driver school by beating her about the head with his fist, and she subsequently ended their relationship; a couple of weeks later, defendant accosted her at her place of employment, she responded she had nothing to say to him, and he then knocked her down with a punch to the head and proceeded to kick her head, face, and arms.

The prosecution also presented evidence that on the morning of October 8, 1980, deputy sheriffs made a number of unsuccessful attempts to get defendant out of bed to attend trial; finally, defendant jumped to his feet, raised his fists to the deputies, resisted their efforts to take him to court, yelled obscenities, and spat in one deputy's face. Defendant attempted to show that he had been provoked and was subjected to excessive force.

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In its case, the defense presented evidence to portray defendant as a human being and thereby move the jury to exercise mercy. In substance the evidence presented consisted of the testimony of family members and friends who asked that the jury spare defendant's life. These witnesses recalled defendant's religious upbringing, spoke of his human side, and recounted how he had been affected by the death of his younger brother.

b. Right to Self-representation

Defendant contends that he was denied his constitutional right to represent himself at the penalty phase in violation of *Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562, 95 S.Ct. 2525]. Specifically, he claims the court erred by denying a motion he filed on December 27, 1980, in which he requested that the court "relieve counsel or in the alternative permit defendant [to] represent himself."

To properly address the contention, we must summarize certain events that occurred before the court made the ruling at issue. Evidently at arraignment on July 12, 1979, Patrick O'Connor was appointed to represent defendant. On September 25, 1979, on defendant's motion O'Connor was relieved on the ground of incompatibility, and Jerome Wallingford was appointed in his place. On November 7, 1979, dissatisfied with the representation that Wallingford was providing, defendant again made a motion to relieve counsel. Wallingford joined in the motion; the court, however, denied the request. On November 26, 1979, apparently on defendant's motion Wallingford was relieved and Thomas Ryan and Vivian Camberg were appointed in his place. On May 1, 1980, defendant filed a motion requesting that the court relieve Ryan and Camberg and permit him to represent himself. At a hearing on May 9, 1980, defendant withdrew his motion and made a new motion requesting that the court appoint him as cocounsel; the court granted this request. On May 20, 1980, defendant, complaining of their performance, again moved to have Ryan and Camberg relieved and to be permitted to represent himself. Finding inter alia that defendant did not have "a legitimate objection, but [was] only grasping at anything he can think of to delay the proceedings," the court denied the motion.

On October 2, 1980, trial commenced with jury selection. On October 14, 1980, defendant again filed a motion to represent himself. On October 20, 1980, however, he asked that his motion be taken off calendar, stating as follows: "I looked at the problems involved and I feel that [they are] mostly misinterpretations and misunderstandings that possibly could be worked out . . . . I don't want new counsel and then again I don't think pro. per. is the answer to my problems I have right now." On November 3, 1980, defendant revived his motion, claiming essentially that counsel's performance was inadequate in several particulars. Counsel responded with apparently satisfactory explanations on all counts. Finding inter alia that counsel "have done everything possible as far as I have been able to ascertain in the proper representation of Mr. Hamilton," and that defendant had a "proclivity to substitute counsel," the court denied the motion. Later that same day, the guilt phase began with preinstructions to the jury. On November 17, 1980, and December 8, 1980, defendant renewed his request to represent himself, each time without success. On December 9, 10, 12, and 15, 1980, defendant made a variety of complaints about counsel's performance, but was unable to persuade the court that any of them had merit. On December 16, 1980, the jury commenced deliberations.

On January 6, 1981, the jury returned its guilt phase verdicts and defendant filed the motion now in issue—viz., the request that "the court relieve counsel or in the alternative permit defendant [to] represent himself" during the penalty phase. The motion was based on the ground that counsel performed inadequately and failed to adopt the strategy and tactics defendant had proposed. That same day, the court appears to have summarily denied the motion.

At a hearing on January 15, 1981—five days before the penalty phase opened—defendant renewed his motion. Again, the court denied his request. In so ruling it stated as follows.

"I have had the opportunity to see this case from beginning to end and I think that Mr. Ryan and Miss Camberg have done an outstanding job in their representation of the defendant in the face of real adversity through Mr. Hamilton putting stumbling blocks in their path at almost every turn. [¶] It is almost as if Mr. Hamilton were attempting to sabotage his case. [¶] The complaints that Mr. Hamilton has made are, I find, totally and completely without merit.

"I think it would be a real travesty and a mockery if I were to permit Mr. Hamilton to represent himself. He has had violent confrontations with the deputies in the jail. He has had violent confrontations with other persons.

"I have found it necessary for Mr. Hamilton to be handcuffed and in shackles, in effect during the entire trial because I was, frankly, concerned about violence here in the courtroom, about his attacking anybody that might be immediately at hand, and I can assure you that I would be the most disturbed person in the world if I hadn't required that he be in shackles and somebody, either his attorneys or somebody close to Mr. Hamilton in the courtroom were seriously injured.

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"I don't see that there is any change. I don't feel there is any change whatever in my feeling relative to Mr. Hamilton representing himself. He certainly can't represent himself, being in chains.

"Certainly, he'd be in an awfully awkward position to be attempting to roam around the courtroom with his exhibits in the condition he is in, and I am certainly not going to release him from the shackles during the balance of the trial.

"I can only say that Mr. Hamilton has done many things that he shouldn't have done during the course of the trial. He has seemed to, as I have indicated, put stumbling blocks in the path of his attorneys. He has made suggestions which were absolutely preposterous as far as trial tactics are concerned, and if he had followed those tactics, it would have been even, I mean, the result would have been absolutely disastrous from his standpoint of the presentation.

"I can't conceive of Mr. Hamilton representing himself in this final phase, the penalty phase of the trial, the portion of the trial which is going to determine whether he is sentenced to life imprisonment or whether he is sentenced to death. I think it would be a real travesty if I were to do otherwise."

In *People* v. *Windham* (1977) 19 Cal.3d 121 [137 Cal.Rptr. 8, 560 P.2d 1187], we held that "in order to invoke the constitutionally mandated unconditional right of self-representation a defendant in a criminal trial should make an unequivocal assertion of that right within a reasonable time prior to the commencement of trial. Accordingly, when a motion to proceed *pro se* is timely interposed, a trial court must permit a defendant to represent himself upon ascertaining that he has voluntarily and intelligently elected to do so, irrespective of how unwise such a choice might appear to be. Furthermore, the defendant's 'technical legal knowledge' is irrelevant to the court's assessment of the defendant's knowing exercise of the right to defend himself. [Citation.] However, once a defendant has chosen to proceed to trial represented by counsel, demands by such defendant that he be permitted to discharge his attorney and assume the defense himself shall be addressed to the sound discretion of the court. When such a midtrial request for self-representation is presented the trial court shall inquire *sua sponte* into the specific factors underlying the request thereby ensuring a meaningful record in the event that appellate review is later required. Among other factors to be considered by the court in assessing such requests made after the commencement of trial are the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or

delay which might reasonably be expected to follow the granting of such a motion. Having established a record based on such relevant considerations, the court should then exercise its discretion and rule on the defendant's request." (*Id.* at pp. 127-129, fns. omitted.)

We are of the opinion that the court's denial of the motion in question was not error. (3a) Because defendant's request was filed in the midst of the jury's guilt phase deliberations, it was not timely for purposes of invoking an absolute right of self-representation under *Faretta* v. *California*, *supra*, 422 U.S. 806. (*Hamilton I*, *supra*, 41 Cal.3d at p. 421 [motion made after jury selection but before opening statements held untimely].) Accordingly, it was within the court's discretion to grant the request or not. (4) On review we cannot conclude that the court abused its discretion in denying the motion: having considered the *Windham* factors, the court made the reasonable determination that defendant should not be permitted to represent himself at the penalty phase. The fact that the court considered such irrelevant factors as defendant's inability "to roam around the courtroom" in shackles and his lack of competence in law does not undermine the soundness of its determination.

(3b) Defendant claims that his *Faretta* motion was indeed timely and hence effectively invoked an unconditional right of self-representation. He argues that the penalty phase of a capital trial amounts in actuality to a separate trial, and that he made his motion within a reasonable time prior to the commencement of that phase. We must reject the point because its predicate is unsound.

First, as even defendant acknowledges, the penalty phase has no separate formal existence but is merely a stage in a unitary capital trial. Second and more important, the connection between the phases of a capital trial is substantial and not merely formal. For example, Penal Code section 190.4, subdivision (c), provides that as a general matter "If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to [Penal Code] Section 1026, the truth of any special circumstances which may be alleged, and the penalty to be applied . . . ." Subdivision (d) of that same section declares that "In any case in which the defendant may be subject to the death penalty, evidence presented at any prior phase of the trial, including any proceeding under a plea of not guilty by reason of insanity pursuant to Section 1026 shall be considered at any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase."

Thus, we conclude that defendant was not denied a constitutional right of self-representation.

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b. *Constitutionality of the Sentencing Formula of Penal Code Section 190.3*

(5) Defendant contends that the sentencing formula of Penal Code section 190.3 (hereafter section 190.3) is unconstitutional on the ground that it withdraws from the trier of fact constitutionally compelled discretion and thereby undermines the reliability of the verdict. Section 190.3, subdivision (k) states in relevant part that "the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." The point defendant makes here, however, was rejected in *People* v. *Brown* (1985) 40 Cal.3d 512, 538-544 [220 Cal.Rptr. 637, 709 P.2d 440], reversed on other grounds *sub nomine California* v. *Brown* (1987) 479 U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837].

c. *Brown Error*

(6) Defendant may be understood to contend that former CALJIC No. 8.84.2, incorporating the mandatory sentencing language of section 190.3, may have misled the jurors to his prejudice as to the scope of their sentencing responsibility and discretion in violation of the constitutional principles set forth in *People* v. *Brown*, *supra*, 40 Cal.3d at pages 538-544.

In *Brown* we held that section 190.3, as construed therein, was not unconstitutional. (40 Cal.3d at pp. 538-544.) In conformity with settled constitutional principles, we interpreted the statutory language to require jurors to make " . . . 'an individualized determination on the basis of the character of the individual and the circumstances of the crime' " (id. at p. 540, italics deleted) and a "' . . . moral assessment of [the] facts . . .' " (*ibid.*)—and thereby decide "which penalty is appropriate in the particular case" (*id.* at p. 541).

Although in *Brown* we upheld the constitutionality of section 190.3, we nevertheless recognized that when delivered in an instruction the provision's mandatory sentencing language might mislead jurors as to the scope of their sentencing discretion and responsibility. (40 Cal.3d at p. 544, fn. 17.) Specifically, we believed that a juror might reasonably understand that language to define the penalty determination as "simply a finding of facts" (*id.* at p. 540) or "a *mere* mechanical counting of factors on each side of an imaginary 'scale' " (*id.* at p. 541). We also believed that a juror might reasonably understand the language to require him to vote for death if he finds that the evidence in aggravation outweighs the evidence in mitigation—even if he determines that death is not the appropriate penalty under all the

circumstances. (See *id.* at pp. 540-544.) For this reason we directed trial courts thereafter to instruct jurors in conformity with the principles set forth therein, rather than in the bare words of the statute. (*Ibid.*) With respect to cases—such as the present—in which the jurors had been instructed in the statutory language, we announced that we would examine each such appeal on its merits to determine whether the jurors may have been misled to the defendant's prejudice. (*Ibid.*)

We turn now to the case at bar. After reviewing the record of the penalty phase in its entirety, we cannot conclude that the jurors may have been misled to defendant's prejudice by former CALJIC No. 8.84.2. Indeed, we believe that they were adequately informed as to what they were to do, and how they were to proceed, in the determination of penalty, and that neither concern expressed in *Brown* was substantially implicated. In support we make the following observations. First, although in closing argument the prosecutor referred briefly to the mandatory sentencing language, he clearly acknowledged that the jurors were "called upon to make the tremendous decision, tough decision," and were given discretion by the law to that end. Second, in his closing argument defense counsel emphasized that it was the responsibility of the jurors, and the jurors alone, to determine whether the death penalty was appropriate for defendant. Third, at defendant's request the court instructed the jurors as follows: "In weighing the aggravating and mitigating factors, you are not to merely count numbers on either side. You are instructed rather to weigh and consider the factors on each side as a whole"; and, "In order to impose a death sentence, you must be convinced beyond a reasonable doubt that the totality of the aggravating circumstances outweigh[s] the totality of the mitigating circumstances."

Thus, on this record we find no *Brown* error.

d. *Easley "Factor (k)" Error*

(7) Defendant may be understood to contend that the pre-*Easley* (*People* v. *Easley* (1983) 34 Cal.3d 858 [196 Cal.Rptr. 309, 671 P.2d 813]) CALJIC No. 8.84.1 (k) instruction (hereafter former factor (k)), which was given in this case, may have misled the jurors as to the scope of their sentencing responsibility and discretion to defendant's prejudice.

Pursuant to former CALJIC No. 8.84.1, the court instructed the jurors that in determining the penalty they should consider several specified circumstances and also "(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

In *People* v. *Easley*, *supra*, 34 Cal.3d 858, we concluded that the language of former factor (k) might mislead the jurors about the scope of their

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discretion and responsibility under the federal Constitution as construed in *Lockett* v. *Ohio* (1978) 438 U.S. 586, 604 [57 L.Ed.2d 973, 989-990, 98 S.Ct. 2954], and *Eddings* v. *Oklahoma* (1982) 455 U.S. 104, 110 [71 L.Ed.2d 1, 8, 102 S.Ct. 869], in which the United States Supreme Court held that a sentencer may "'not be precluded from considering as a *mitigating factor*, any aspect of the defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death.'" (Italics in original.)

Because of the potentially misleading language of the instruction, we directed trial courts thereafter to inform the jury that they may consider in mitigation not only factor (k) but also "any other 'aspect of [the] defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death.'" (34 Cal.3d at p. 878, fn. 10.)

In *People* v. *Brown*, *supra*, 40 Cal.3d 512, we announced that with respect to cases—such as the present—in which the jury had been instructed pursuant to the former factor (k), we would examine each such appeal on its merits to determine whether the jury may have been misled to the defendant's prejudice. (*Id.* at p. 544, fn. 17.) In conducting such an examination, we look to "'the totality of the penalty instructions given and the arguments made to the jury' . . . ." (*People* v. *Rodriguez* (1986) 42 Cal.3d 730, 786 [230 Cal.Rptr. 667, 726 P.2d 113].)

We turn now to the case at bar. After reviewing the record of the penalty phase in its entirety, we cannot conclude that the jurors may have been misled to defendant's prejudice by the former factor (k) instruction. Indeed, we are of the opinion that the jurors were in fact adequately informed that they could consider character and background evidence. After the defense presented a case that consisted entirely of such evidence, the court instructed the jurors as follows: "The mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death sentence upon Mr. Hamilton. You should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances presented as reasons for not imposing the death sentence."

Thus, on this record we find no *Easley* "factor (k)" error.

e. *Ramos Error*

(8) Defendant contends that the court committed reversible error under *People* v. *Ramos* (1984) 37 Cal.3d 136 [207 Cal.Rptr. 800, 689 P.2d 430]. In accordance with the so-called Briggs Instruction (former CALJIC No

8.84.2 (1979)) the court delivered the following charge: "You are instructed that under the state Constitution, a governor is empowered to grant a reprieve, pardon or commutation after sentence following conviction of a crime. Under this power a governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole."

In *People* v. *Ramos*, *supra*, 37 Cal.3d at page 153, we held that "the Briggs Instruction is incompatible with [the] guarantee of 'fundamental fairness' [established in the due process clauses of our Constitution (Cal. Const., art. I, §§ 7, 15)] both because it is seriously and prejudicially misleading and because it invites the jury to be influenced by speculative and improper considerations."

As to the misleading character of the instruction, we stated as follows: "Under the California Constitution, the Governor's power of commutation or pardon extends equally to a sentence of death and to a sentence of life without possibility of parole. [Citation.] The Briggs Instruction, however, informs the jury only that a sentence of life without possibility of parole may be commuted. Although the instruction is literally accurate as far as it goes, it is a classic example of a misleading 'half-truth.' Since the instruction is only given in a penalty trial—when the jury's attention is narrowly focused on two alternative punishments—the instruction would reasonably be understood by the average juror to mean, by negative implication, that while a sentence of life without possibility of parole may be commuted, a sentence of death may not. Viewed realistically and in context, the instruction provides the jury with seriously misleading information." (37 Cal.3d at p. 153, fn. omitted.)

Further, we explained that "there are a variety of reasons why . . . consideration [of the commutation power] is improper. The first and perhaps most obvious problem is the speculative nature of the inquiry that the instruction invites. . . . [¶] . . . Here, the jury must attempt to determine not only what a particular defendant will be like in the future but also what some presently unknown person—a future Governor—will do in response to the defendant's then condition. . . . [¶] Furthermore, . . . any instruction which draws the jury's attention to the possibility of future actions by a governor or parole board is likely to affect the jury's decisionmaking process in either of two illegitimate—though very different—ways, diverting the jury from its proper function. [¶] The first vice of such an instruction . . . is that it may tend to diminish the jury's sense of responsibility for its action." (*Id.* at pp. 156-157.) "Second, . . . an instruction on the possibility of commutation invites the jury to go beyond its proper role and attempt to 'preempt' the Governor's constitutional authority by imposing a sentence

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that will at least minimize the opportunity for such a commutation." (*Id.* at p. 158.)

Under *Ramos*, we conclude that the court erred by charging the jury in accordance with the Briggs Instruction: the language of the instruction is misleading and invites speculation on irrelevant and improper matters.

The Attorney General argues in substance that a supplementary charge, delivered by the court immediately after the Briggs Instruction, made that instruction nonerroneous or in any event nonprejudicial. As relevant here, the court's full instructions were as follows:

"It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on Mr. Hamilton.

"You are instructed that under the state Constitution, a governor is empowered to grant a reprieve, pardon or commutation after sentence following conviction of a crime. Under this power a governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole. This is subject to the requirement that, in the case of any person twice convicted of a felony, a commutation or modification may not be granted absent the written recommendation of at least four justices of the California Supreme Court. Further, a life sentence requires a minimum incarceration of 25 years less one third off for good time credits before parole may be considered by the proper authorities.

"You are now instructed, however, that the matter of a possible commutation or modification of sentence is not to be considered by you in determining the punishment for Mr. Hamilton. You must not speculate as to whether such commutation or modification would ever occur. It is not your function to decide now whether this man will be suitable for parole at some future date. So far as you are concerned, you are to decide only whether this man shall suffer the death penalty or whether he shall be permitted to remain alive. If upon consideration of the evidence you believe that life imprisonment without possibility of parole is the proper sentence, you must assume that the governor, the Supreme Court, and those officials charged with the operation of our parole system will perform their duty in a correct and responsible manner, and that Mr. Hamilton will not be paroled unless he can be safely released into society. It would be a violation of your duty as jurors if you were to fix the penalty at death because of a doubt that the governor and other officials will properly carry out their responsibilities."

Having considered the matter closely, we cannot agree that the supplementary charge somehow rendered the Briggs Instruction free of error: that charge drew out after the objectionable language, which continues to mislead and to invite speculation on irrelevant and improper matters.

We do agree, however, that on this record the error was nonprejudicial. As stated above, the court instructed the jurors "not to consider[]" "the matter of a possible commutation or modification of sentence . . . in determining the punishment for Mr. Hamilton," "not [to] speculate as to whether such commutation or modification would ever occur," and "not . . . to decide now whether this man will be suitable for parole at some future date." Defendant argues that the supplementary charge did not cure the harm of the Briggs Instruction, but rather led the jurors to indulge in irrelevant and improper speculation. The clear meaning of the plain words of the admonition, however, refutes this argument.

The court also delivered the following charge: "I have previously read to you the list of aggravating circumstances which the law permits you to consider if you find that any of them is established by the evidence. Those are the only aggravating circumstances that you may consider. You are not allowed to take account of any other facts or circumstances as the basis for deciding that the death penalty would be an appropriate punishment in this case."

Through these instructions, the court directed the jurors not to make any use of the Briggs Instruction in determining the penalty to be imposed on defendant. Jurors are, of course, presumed to follow the instructions given by the court. (E.g., *Delli Paoli v. United States* (1957) 352 U.S. 232, 242 [1 L.Ed.2d 278, 285-286, 77 S.Ct. 294].) In this case we find no reason to believe that the jurors failed to discharge their duty.

Defendant argues in substance that the prosecutor explained the Briggs Instruction in closing argument and thereby made the harm threatened by the instruction incurable. The comment complained of is as follows: "Now, [defense counsel will] say, 'If you give him life in prison, he will have to spend the rest of his days thinking about his crimes and thinking about the victims.' No way. . . . This defendant wouldn't spend all his time in prison thinking about his horrible crime. He's be conniving and devising ways to manipulate the system and get out. Look at his letters [to Officer Bova, Ruth Story and the San Diego District Attorney's office] now, how he operates."

We do not believe that the prosecutor intended this comment to refer to the Briggs Instruction. Had he devised to anticipate that charge, he would

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evidently have touched on the Governor's commutation power expressly or at least by clear implication. But as the words of the remark show, he did not do so. More important, we do not believe that the jury would have understood the comment to refer to the instruction. the remark does not even allude to the commutation power. In any event, the comment was brief and isolated. As such, it could not make the error in this case incurable.

Hence, we conclude that on the facts of this case the giving of the Briggs Instruction did not amount to reversible error.

f. Consideration of Invalid Felony-murder-burglary Special Circumstance

(9) Defendant contends that the felony-murder-burglary special-circumstance finding was invalid (*see ante*, fn. 7) and, as such, was improperly presented to the jurors as evidence in aggravation under the instruction directing them to consider "the existence of any special circumstance found to be true." He then contends that the error requires reversal. We cannot agree. Assuming for argument's sake that the finding was invalid, we are nevertheless of the opinion that even if the jurors had not been instructed to consider the existence of this finding, they still would have returned a verdict of death. whereas the evidence in aggravation—even without the finding—was overwhelming, the evidence in mitigation was minimal.

g. Failure to Exercise Discretion to Strike the Special Circumstance Findings

Defendant contends in substance that at the automatic penalty-modification hearing conducted pursuant to Penal Code section 190.4, subdivision (e), the court had the authority, under Penal Code section 1385 (hereafter section 1385), to strike the special circumstance findings "in furtherance of justice" in order that he might be eligible for parole. He further contends that the court failed to consider whether it should exercise that authority.

(10) We agree that under the 1978 death penalty law the court had the authority to strike the special circumstance findings pursuant to section 1385. Indeed, we so held in *People v. Williams* (1981) 30 Cal.3d 470 [179 Cal.Rptr. 443, 637 P.2d 1029].

We cannot agree, however, that the court failed to consider whether it should exercise this authority. On our reading of the record, the court appears to have impliedly determined that there was no basis for striking the special circumstance findings. As the court expressly found, "the evi-

dence in aggravation is overwhelming and the evidence in mitigation is virtually nonexistent."

Defendant argues in substance that the court may nevertheless have entertained the erroneous belief that it was without authority to strike the special circumstance findings, and that it should be directed to determine whether or not there was a basis to strike those findings. We are not persuaded. The record contains no evidence suggesting that the court believed it was without such authority. In the absence of such evidence, we are unwilling to assume that the court may have entertained an erroneous belief as to the scope of its powers. We presume the court was aware of the general rule that section 1385 authorizes the court to dismiss "in furtherance of justice" in any circumstance in which the legislative body has not clearly manifested a contrary intent. (*People v. Superior Court (Howard)* (1968) 69 Cal.2d 491, 503-505 [72 Cal.Rptr. 330, 446 P.2d 138] [dismissing entire action].) We also presume the court read the death penalty law, as we subsequently did in *People v. Williams, supra*, 30 Cal.3d at pages 484-485, as not intended to limit the court's authority in the circumstances relevant here. Accordingly, we cannot conclude that the court erroneously believed it was without authority to strike the special circumstance findings under section 1385.

(11) Finally, we are of the opinion that in view of the theories presented and the evidence introduced, the jury's guilt phase verdicts imply a finding that defendant was the actual killer (*Enmund v. Florida* (1982) 458 U.S. 782, 788-801 [73 L.Ed.2d 1140, 1145-1154, 102 S.Ct. 3368]). Having reviewed the record in its entirety, we conclude that this finding is amply supported by the evidence and adopt it as our own. Accordingly, we hold that the imposition of the penalty of death on defendant does not violate the Eighth Amendment. (*Cabana v. Bullock* (1986) 474 U.S. 376, 386 [88 L.Ed.2d 704, 716, 106 S.Ct. 689, 697].)[*]

II. HABEAS CORPUS (CRIM. 25303)

In his petition for a writ of habeas corpus in Crim. 25303, defendant bases his claim to relief on three grounds. He first asserts he was not provided with effective assistance by trial and appellate counsel. (12) To establish such a point, a defendant must show that counsel (1) performed at a level below an objective standard of reasonableness under prevailing professional norms; and thereby (2) subjected the defense to prejudice, i.e., in

[*] After oral argument defendant submitted a number of motions to preparte persons asking that appointed appellate counsel be relieved and other specified counsel be substituted in his place. Because each of these attorneys has declined to state he is available or has declared he is unavailable, we deny the motions.

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the absence of counsel's failings a more favorable outcome was reasonably probable. (*People* v. *Ledesma* (1987) 43 Cal.3d 171, 216-218 [233 Cal.Rptr. 404, 729 P.2d 839].) As we shall explain, defendant fails to make a prima facie case of entitlement to relief.

(13) Defendant alleges broadly that trial counsel made various errors in strategy and tactics and, more specifically, that they feared him and treated him with distrust. Such assertions do not effectively allege either deficient performance or prejudice.

He also alleges appellate counsel refused to argue that facial expressions and gestures trial counsel assertedly made during jury selection prejudiced the defense. This statement too fails to effectively allege either deficient performance or prejudice.

Defendant next claims that he was denied due process because the trial judge was biased. In support of his point, he cites the following incidents: (1) in an in camera hearing the judge stated he believed trial counsel and did not believe defendant in a dispute as to whether counsel had threatened him with harm, and (2) in another in camera conference, the judge told him, "You have proven yourself an unmitigated liar during the course of this whole trial." (14) But the fact that the judge made these statements—much of which is more than adequately supported by the evidence—does not amount to a prima facie showing of bias. "'[W]hen the state of mind of the trial judge appears to be adverse to one of the parties but is based upon actual observance of the witnesses and evidence given during the trial of an action, it does not amount to . . . prejudice . . . .'" (*People* v. *Yeager* (1961) 55 Cal.2d 374, 391 [10 Cal.Rptr. 829, 359 P.2d 261].)

Defendant's final "claim" is in substance as follows: he wants that at the new trial that might have followed our decision in *Hamilton I* the court would again deny his request to represent himself. Whether or not the court would so rule in the future raises no issue cognizable on habeas corpus. In any event, because we affirm the judgment in its entirety there will be no such new trial.

III. HABEAS CORPUS (S001870)

In his petition for a writ of habeas corpus in S001870, defendant bases his claims to relief on what are in substance four grounds. He first asserts he was not provided with effective assistance by trial and appellate counsel,[As will appear, he fails to make a prima facie case.

To begin with, we seriously doubt defendant has adequately alleged deficient performance on the part of counsel. His first complaint is that

counsel failed to communicate with him or to allow him to participate in the development of strategy and tactics. The charge, however, is conclusory and without specificity. The second complaint is that counsel failed to fully investigate the facts of the case. This charge runs in substance as follows: Buchanan, as is undisputed, left class on the night of May 30, 1979, before an optional quiz was given, a copy of that quiz was subsequently found in the van, that copy—defendant conjectures—must have been brought to the van by one of Buchanan's classmates; that classmate—defendant declares—may have been the killer; counsel knew that Buchanan had left class before the quiz was given, and knew that a copy of the quiz was found in the van, therefore, counsel should have sought evidence about the classmate. We doubt, however, that counsel's performance can be called deficient. There was simply nothing more than the merest speculation that an unknown classmate may have gone to the van and may have killed Buchanan. Without something more, it is difficult to conclude that counsel was obligated to investigate further.

In any event, we are of the opinion that defendant has not adequately alleged prejudice. Indeed, he has wholly failed to show that absent counsel's alleged failings a more favorable outcome in the guilt phase was reasonably probable on the facts of this case.

Defendant next claims that the prosecution introduced "False evidence . . . substantially material or probative on the issue of guilt" (Pen. Code, § 1473, subd. (b)(1)). His complaint is in essence as follows: the optional quiz must have been brought into the van by one of Buchanan's classmates; the prosecution was aware of this fact, but presented its case as though Buchanan brought the quiz to the van herself. The premise is unsound: the record establishes that after class Buchanan spoke with friends who had taken the quiz, probably obtained a copy from one of them, and therefore may have brought it to the van herself. Hence, defendant fails to make a prima facie case.

(15) Defendant also claims that he had a right to be present at a pretrial hearing conducted on July 6, 1981. At that hearing, the court in essence established a schedule under which a defense criminologist could examine the van, which was then in storage in Oklahoma, before it was driven back to California by agents of the prosecution. Again, as will appear, no prima facie case is made.

It is the rule that "the accused is not entitled to be personally present . . . [on] matters in which defendant's presence does not bear a '"reasonably substantial relation to the fullness of his opportunity to defend against the charge."'" (*People* v. *Jackson* (1980) 28 Cal.3d 264, 309 [168 Cal.Rptr.

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603, 618 P.2d 149], citing cases (plur. opn.).) Under this rule, defendant did not have a right to be present at the hearing: his attendance at what was essentially a scheduling hearing would not have been useful or of benefit to the defense.

(34) Defendant's final claim is that the prosecution interfered with his attempt to obtain evidence. Specifically, he charges that the prosecution had the van examined and cleaned before the defense criminologist could subject it to inspection and tests. It is of course the rule that "in no event can duly constituted authority hamper or interfere with efforts on the part of an accused to obtain [evidence] . . . , without denying him due process of law." (*In re Morton* (1962) 58 Cal.2d 309, 312 [24 Cal.Rptr. 833, 374 P.2d 801] [blood sample to determine intoxication].) The petition, however, fails to adequately allege interference: it states that the prosecution had the van examined and cleaned before the defense criminologist could begin his work; it does not state that the criminologist acted without undue delay or that the delay on his part was attributable to the prosecution.

The judgment is affirmed. The petition for writ of habeas corpus in Crim. 25303 is denied. The petition for writ of habeas corpus in S001870 is denied.

Lucas, C. J., Panelli, J., Arguelles, J., Eagleson, J., and Kaufman, J., concurred.

BROUSSARD, J.—Concurring and dissenting.—I concur in the affirmance of the findings of guilt and special circumstances and in the denials of the petitions for writ of habeas corpus. I dissent from the affirmance of the death penalty.

The majority properly conclude that the trial court erred in giving an instruction in accordance with the so-called Briggs Instruction (former CALJIC No. 8.84.2 (1979)) on the Governor's power to commute a sentence of life without possibility of parole. (*People v. Ramos* (1984) 37 Cal.3d 136, 153 [207 Cal.Rptr. 800, 689 P.2d 430].) As the majority recognize, the language of the instruction is misleading and invites speculation on irrelevant matters. However, the majority also conclude that subsequent instructions telling the jury to disregard the Governor's power to commute eliminated any prejudice. I do not agree.

In my view the error was prejudicial. I cannot agree that the later instructions unrung the bell. Far from unringing the bell, the subsequent instructions could only have the effect of reminding the jury again and again of the Governor's commutation power. Furthermore the prosecutor exploited the error in closing argument. To conclude that, when the cacophony was

complete and overwhelming, there was no prejudice is to turn a deaf ear to fairness and justice.

The Briggs Instruction has been uniformly held to be prejudicial error in a penalty trial because it is so misleading as to constitute a denial of due process, improperly tilting the jury in favor of the death penalty. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1150-1151 [240 Cal.Rptr. 585, 742 P.2d 1306]; *People v. Myers* (1987) 43 Cal.3d 250, 272-273 [233 Cal.Rptr. 264, 729 P.2d 698]; *People v. Monteil* (1985) 39 Cal.3d 910, 928 [218 Cal.Rptr. 572, 705 P.2d 1248]; *People v. Haskett* (1982) 30 Cal.3d 841, 861-863 [180 Cal.Rptr. 640, 640 P.2d 776].) In *Anderson*, it is stated that the Briggs Instruction "necessarily subjects the defendant to prejudice." (43 Cal.3d at p. 1151.) As pointed out in *Myers*: "The Attorney General . . . has cited no instance, and we are aware of none, in which this type of instructional error has been found nonprejudicial in a death penalty case, and in view of the very serious potential for prejudice emphasized in *Ramos*, we strongly doubt whether we could ever confidently conclude that there was no reasonable possibility that this instruction improperly tainted the jury's decision-making process." (43 Cal.3d at p. 272.)

In *Myers*, the defendant introduced evidence of the past practices of California governors to show that it was extremely unlikely that he ever would be released if sentenced to life without possibility of parole. The court concluded that far from neutralizing the improper instruction "in reality the additional focus on commutation in this case had the inevitable and unfortunate effect of highlighting the ostensible importance of the commutation question." (43 Cal.3d at pp. 272-273.)

In this case the trial court's instruction to the jury that it was their duty to determine whether death or confinement in state prison without possibility of parole should be imposed on defendant was followed immediately by its instruction on the Governor's commutation power. The court thereby emphasized the importance of the instructions on the Governor's powers, suggesting that they are the first and most important step in the process of determining the penalty.[1]

[1] "It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on Mr. Hamilton.

"You are instructed that under the state Constitution, a governor is empowered to grant a reprieve, pardon or commutation after sentence following conviction of a crime. Under this power a governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole.

"This is subject to the requirement that, in the case of any person twice convicted of a felony, a commutation or modification may not be granted absent the written recommendation

The importance of the Governor's powers was further emphasized because of their length, the instructions went beyond those contemplated by Penal Code section 190.3, the *Briggs* Instruction.

The first instruction was not limited to the Governor's power to commute a sentence of life imprisonment without possibility of parole. Rather it spoke of the Governor's powers generally. Subsequent instructions told the jury of the Governor's power to commute a sentence of life imprisonment without possibility of parole to a sentence of life imprisonment with parole, a limitation on the power, and the effect of a commutation. The instructions did not stop with the instruction contemplated by Penal Code section 190.3 condemned in *Ramos* but repeatedly emphasized the Governor's power. The instructions thus were not the brief but invalid reference to the Governor's power contemplated by Penal Code section 190.3 but included in addition an instruction applicable to a death sentence and instructions detailing matters which could only serve to toll the bell repeatedly. While the majority concede that error occurred (maj. opn., p. 374), they do not recognize the full scope of the error.

The majority further take the position that subsequent instructions told the jury to disregard the prior instructions, that we must presume the jury followed the later instructions and that they eliminated the prejudice due to the erroneous instructions on the Governor's powers. (Maj. opn., *ante*, at p. 375.)

I doubt whether any instruction could eliminate the prejudice flowing from the improper and detailed emphasis placed on the Governor's commutation power. The power was given too much importance and emphasis to allow further instructions to eliminate the prejudice. Furthermore the subsequent instructions given in the instant case were in themselves erroneous, confusing and contradictory and, when all was said and done, probably left the jury with the view that it should consider the Governor's powers so long as it assumed that the powers would be properly exercised. Such instructions do not eliminate the prejudice flowing from the improper mention of the Governor's powers; they exacerbate the prejudice.[1]

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of at least four justices of the California Supreme Court. Further, a life sentence requires a minimum incarceration of 25 years less one third off for good time credits before parole may be considered by the proper authorities."

[1]"You are now instructed, however, that the matter of a possible commutation or modification of sentence is not to be considered by you in determining the punishment for Mr Hamilton. You must not speculate as to whether such commutation or modification would ever occur.

Like the evidence of past Governor practices in *People v. Myers, supra*, 43 Cal.3d 250, 272-273, the instructions relied upon by the majority in the instant case, far from neutralizing the improper instructions on the commutation power, served to emphasize the commutation question. The jury was initially told not to consider a possible commutation or to speculate whether there would be a commutation, and it was not its function to determine whether defendant would be suitable for parole at a later date. But telling the jury not to consider a *possible* commutation, to speculate, or to decide whether this man will be suitable for parole at some later date simply emphasizes the commutation question in the juror's mind.

Moreover, the jury was not told to ignore the Governor's power but was told that the Governor, the Supreme Court and the parole officials would properly perform their duties. In *Ramos*, after concluding that fundamental fairness precluded telling the jury of the commutation power, the court addressed the question whether the jury should be told *not* to consider the Governor's commutation power. While we recognized that in some circumstances not relevant here the jury might be told to disregard the power, we concluded that the jury should not be so instructed because the instruction "is simply more likely to bring the matter to the jury's attention and, as a practical matter, be difficult to follow." (37 Cal.3d at p. 159, fn. 12.) Accordingly, even if no commutation instruction had been given, it would have been error in the instant case to give the supplementary instructions because they called the jury's attention to the commutation issue. To conclude, as the majority do, that an instruction which is erroneous because it may call the jury's attention to a prejudicial matter somehow eliminates the prejudice in other instructions which call the jury's attention to the very same prejudicial matter involves a mental exercise incomprehensible to me.

But even if we accept the majority's thesis that somehow instructions which are error because of their prejudicial effect can somehow cure other instructions which are error because they have the same prejudicial effect, we still must look at the content of the subsequent instructions of the trial court.

"It is not your function to decide now whether this man will be suitable for parole at some future date. So far as you are concerned, you are to decide only whether this man shall suffer the death penalty or whether he shall be permitted to remain alive.

"If upon consideration of the evidence you believe that life imprisonment without possibility of parole is the proper sentence, you must assume that the Governor, the Supreme Court, and those officials charged with the operation of our parole system will perform their duty in a correct and responsible manner, and that Mr. Hamilton will not be paroled unless he can be safely released into society.

"It would be a violation of your duty as jurors if you were to fix the penalty at death because of a doubt that the Governor and other officials will properly carry out their responsibilities." (Italics added.)

Far from being told that it was improper to consider the possibilities of commutation and subsequent parole, the jury was told that it should consider those possibilities but only in the perspective that, when and if defendant was paroled, it would be done lawfully. The instructions to disregard and not to consider were literally contradicted and the jury was left with not only erroneous instructions but also contradictory and confusing instructions as to the importance of the Governor's commutation power.

What did this jury do when faced with confusing and conflicting instructions concerning the Governor's commutation power? All we can do is guess. I suspect that the jury may have concluded that it should not try to determine whether this defendant would have his sentence commuted and obtain a parole but that it must conclude that the commutation power was a factor militating against life imprisonment without possibility of parole and in favor of the death penalty and that it must assume that if defendant was paroled it would be done lawfully. To execute a defendant based on the Governor's power to commute sentences whether done lawfully or unlawfully violates the fundamental fairness guaranteed by the due process clause of our state Constitution.

The prosecutor exploited the fundamental unfairness of the instructions in his closing argument. The prosecutor suggested that if defendant received a sentence of life imprisonment he "wouldn't spend all his time in prison thinking about his horrible crimes. He'd be conniving and devising ways to *manipulate the system and get out*. . . . Look at his letters [to Officer Birse, Ruth Story and the San Diego District Attorney's office] now, how he operates." (Italics added.) The comment is a direct comment on the possibility that defendant would be paroled. The only way that he could "manipulate the system and get out" by appealing to governmental authorities was through exercise of the commutation power. The majority suggest that the prosecutor was only trying to state that defendant was lacking in feeling and self-centered (maj. opn., p. 374), but the comment speaks for itself.

In the instant case the instructions discussing the Governor's powers were so long as those setting forth and defining the aggravating and mitigating circumstances which should control the application of the death penalty. I am satisfied that the instructions on the Governor's powers were more harmful than any we have seen in prior cases. The supplemental instructions relied upon by the majority did not eliminate the prejudice but could only have emphasized the commutation power and confused the jury into

believing that the power was an important matter, if not the most important matter, to be considered by the jury in determining the penalty. The prosecutor referred to possible parole in his closing argument, and the prejudice from the errors is overwhelming.

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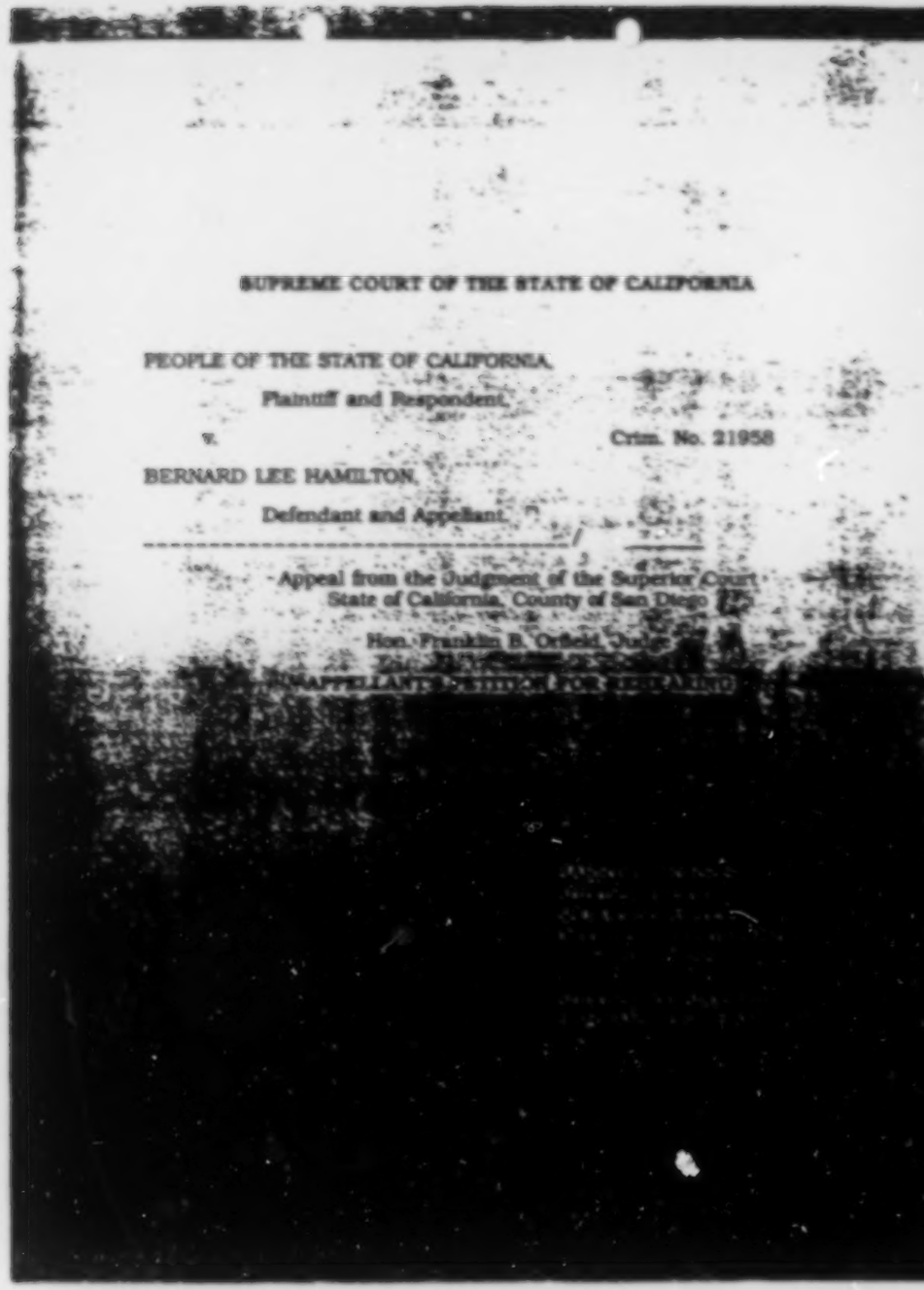
Relevant Portions of Petition for Rehearing



SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v. Crim. No. 21958

BERNARD LEE HAMILTON,

Defendant and Appellant.

Appeal from the Judgment of the Superior Court
State of California, County of San Diego
Hon. Franklin B. Orfield, Judge

APPELLANT'S PETITION FOR REHEARING

I

THE COURT SHOULD GRANT APPELLANT'S PETITION FOR A REHEARING BECAUSE THE COURT'S OPINION IS INCORRECT IN ITS ASSUMPTION THAT THE REMAND BY THE UNITED STATES SUPREME COURT FOR FURTHER CONSIDERATION IN LIGHT OF ROSE V. CLARK RENDERED THE COURT'S DECISION IN *PEOPLE V. HAMILTON I* (1985) 41 CAL.3d 408 A NULLITY

A

INTRODUCTION

This case was originally decided by this Court in *People v. Hamilton* (1985) 41 Cal.3d 408. Following the denial of respondent's petition for a rehearing, respondent filed a Petition for a Writ of Certiorari in the United States Supreme Court regarding the impact of *Cabana v. Bullock* (1986) 474 U.S. 376 on appellant's case. On April 18, 1988, Respondent filed an Application for Stay of Enforcement of Judgment with Justice Rehnquist, then Circuit Justice of the United States Supreme Court for the Ninth Circuit.

On May 6, 1986, Justice Rehnquist issued the requested stay, noting, *inter alia*,

> "This Court currently has before it the case of *Rose v. Clark*, No. 84-1974, which involves the question whether a *Sandstrom* error may ever be found harmless and, if so, under what circumstances. Our decision in *Rose v. Clark* may well affect the outcome of the instant case. For this reason, I believe that a majority of this Court would not want to dispose of the petition for certiorari in this case before a decision is rendered in *Rose v. Clark*."

Rose, *supra*, was decided on July 2, 1986, and five days later, the United States Supreme Court issued the following order in appellant's case:

> "The judgment is vacated and the case is remanded to the Supreme Court of California for further consideration in light of *Rose v. Clark*, 478 U.S.__(1986)"

B

THIS COURT'S OPINION IN *HAMILTON I* IS NOT A "NULLITY"

In its opinion in *Hamilton II*, this Court concluded that,

> "the United States Supreme Court vacated the judgment in Hamilton I and rendered the decision a nullity....Because the judgment in Hamilton I was vacated, that decision, of course, is a nullity and as such has no binding force." (Slip op. 15)

Simply put, the Court's conclusion is wrong. The United States Supreme Court has explicitly held that a remand for further consideration in light of an intervening case, "[does] not amount to a final determination on the merits." *Henry v. City of Rock Hill* (1964) 376 U.S. 776, 777 It follows that a remand which is not in itself a final judgment on the merits can hardly be said to render a final judgment a "nullity."

In *Henry*, *supra*, the Supreme Court had remanded a case to the South Carolina Supreme Court for, "further consideration in light of *Edwards v. South Carolina* 372 U.S. 229." The Court noted that,

> "That has been our practice in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent, we remand the case to the state court for reconsideration." *Id.* at 776

After noting that the remand "did not amount to a final determination on the merits," the Court added,

> "That order did, however, indicate that we found *Edwards* sufficiently analogous and, perhaps, decisive to compel re-examination of the case." *Id. at* 777

As one commentator put it,

> "[I]t seems fairly clear that the Court does not treat the summary reconsideration order as the functional equivalent of the summary reversal order..." Stern, Gressman, and Shapiro, *Supreme Court Practice* (6th Ed. 1986) p. 280

The Fifth Circuit has similarly characterized the "reconsideration" order.

> "It is our understanding in this type of remand that the Court has merely 'flagged' this case as one upon which the intervening decision may have some bearing, but which the court has not conclusively determined to be materially affected thereby." *Bush v. Lucas* (5th Cir. 1981) 647 F.2d 573, 575

Similarly, the Ninth Circuit has rejected the conclusion that a remand for reconsideration in light of an intervening precedent is the equivalent of a summary reversal.

> "It would be all but impossible to distinguish between cases in which only reconsideration was intended and those in which reversal was thought proper. Consequently, our duty is to read the intervening Supreme Court decision fairly and determine whether it requires a different result." *Ostrofe v. H.S. Crocker., Inc.* (9th Cir. 1984) 740 F.2d 739, 748

Finally, the conclusion of the Fifth and Ninth Circuits was echoed by the Court of Appeal in *In re Patrick W.* (1980) 104 Cal.App.3d 615. In that case, the United States Supreme Court had remanded the lower court's decision, "for further consideration in the light of *Fare v. Michael C.* (1979) 442 U.S. 707." The court noted that the facts of *Fare, supra,* were,

> "distinguishable from those before us on this appeal...Admittedly there is *language* in the Supreme Court opinion that might be interpreted as indicating that that court would take a similar view of a right to see grandparents. However, in its action in the case before us, the United States Supreme Court did not reverse our judgment on the authority of *Michael C.* but merely directed us to reconsider our opinion 'in the light of' that opinion. We have obeyed that direction." *Id.* at 617

In an article published in the Hastings Constitutional Law Quarterly,* Professor Arthur Hellman examined the Supreme Court's practice of remanding for reconsideration of intervening precedent and concluded that,

> "the Court appears to be saying that such orders are issued when the Justices have found enough similarities between the case before

* Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions*, 11 Hastings Const. Law Q. 5 (1984)

> them and the intervening decision to indicate as a prima facie matter, that the judgment below is in error, but because of other aspects of the case, the Court is not prepared to reverse outright." *Hellman, supra,* 10

This conclusion is supported by the Supreme Court's comment in *Goldbaum v. United States* (1954) 348 U.S. 905, 906, another case remanded for reconsideration in light of intervening precedent.

> "We have not considered the merits of these cases, nor have we determined their relation to our recent opinions, *supra*, believing that re-examination by the Courts of Appeals is desirable even in those cases remotely involving the principles laid down in the...decisions."

In his article, Professor Hellman reported the results of a survey he conducted of those cases remanded for reconsideration in light of intervening precedent. In Professor Hellman's opinion, the practice of remanding cases for reconsideration was at least in part a response to calendar pressure felt by the Court.

> "When a newly filed certiorari petition or jurisdictional statement appears to raise an issue similar to one that is being accorded plenary consideration, the Justices face something of a dilemma.
>
> "On the one hand, to grant plenary review would be to allocate a scarce position on the plenary docket to a case that would probably add little or nothing to the precedential guidance available from the case already taken...with the fierce competition for places on the plenary docket today, the procedure [of hearing several cases on the same subject] is now more difficult to justify, and the Court has largely abandoned it.
>
> "On the other hand, to allow the judgment in the later-filed case to stand without regard to the impending plenary decision might be to deprive at least one litigant of the benefit of a new rule of law solely by reason of an accident of timing....
>
> "Given these constraints, it is understandable that the Justices would adopt the practice of holding the new case until the plenary decision is announced and then, unless the judgment below seems clearly in harmony with the new precedent, remanding for further consideration by the lower court."

That is, of course, exactly what happened in this case.

In his study of approximately 100 cases that were similarly held for the decision in the plenary case for the terms 1977-1979, Professor Hellman found that the lower court adhered to its original judgment in sixty cases, despite, "at least a surface inconsistency between the vacated judgment and the cited decision." *Hellman, supra* p. 17

> "Sometimes the [lower] court conceded that the decision cited by the Supreme Court was squarely on point, reversed its ruling on the issue the Justices had addressed, and went on to find that its earlier judgment could be upheld on some other ground. More often, the court determined that the rule set forth in the intervening decision did not apply, or that if it did apply, the facts were sufficiently distinguishable to justify a different result from that of the cited case." *Hellman, supra*, p. 17-18

Most significantly, Professor Hellman concluded that,

> "[W]hile the Court does not automatically direct reconsideration of all cases that have been set aside to await the announcement of a plenary decision, **the criteria for this mode of disposition are not exacting.** Specifically, **a general similarity of issues and a surface inconsistency in results will usually suffice to persuade the Justices to remand a case rather than deny review. The courts that have been directed to reconsider their prior decisions are therefore correct in thinking that a remand order 'should not be read as implying that [the cited authority] necessarily mandates reversal...'"** *Hellman, supra*, at p. 19-20 (emphasis added)

Indeed, this lack of exactitude has lead the Supreme Court to remand for reconsideration in cases which the remand can only be attributable to a lack of careful examination of the lower court's opinion. For instance, in a series of cases remanded for reconsideration in light of *Adams v. Texas* (1980) 448 U.S. 38, the Court remanded one case to the lower court which had already considered and distinguished *Adams*. *May v. State* (1980) 618 S.W.2d 333

Similarly, the Supreme Court remanded two cases to this Court for re-examination in light of *Adams, supra*, *People v. Lamphear* (1980) 26 Cal.3d 814, and *People v. Velasquez* (1980)26 Cal.3d 425. The remand was

curious because *Adams, supra*, involved a Texas court's **affirmance** of a conviction based upon a statute which improperly mandated exclusion of jurors in a capital case in violation of Witherspoon *v. Illinois* (1968) 391 U.S. 510, whereas the California cases **reversed** convictions for improper exclusion of jurors per *Witherspoon*.

Responding to the United States Supreme Court's mandate, this Court noted that it had, "reexamined our opinion in this case...in light of *Adams v. Texas....Adams...*does not alter [our] conclusion." *People v. Velasquez* (1980) 28 Cal.3d 461-462, *People v. Lamphear* (1980) 28 Cal.3d 463-464

In the case at bar, it follows from the above authorities that the Supreme Court's action in remanding the case to this Court for further consideration in light of *Rose v. Clark*, did not render the decision in *Hamilton I* "a nullity." The remand was not the equivalent of a summary reversal, *Ostrofe, supra*, and it was not a "decision on the merits," *Henry, supra*. The case was simply remanded to this court to call attention to an important precedent which this court could not have been aware of when it made its original decision.

C.

EVEN ASSUMING THAT THE UNITED STATES SUPREME COURT'S REMAND WAS TANTAMOUNT TO A SUMMARY REVERSAL, THE REMAND DID NOT RENDER *HAMILTON I* A "NULLITY"

Even assuming, arguendo, that the Supreme Court's decision in *California v. Hamilton, supra*, was somehow the equivalent of a summary reversal, which it was not, that still did not render *Hamilton I* a "nullity." By way of analogy, when the United States Supreme Court reversed this Court's decision in *People v. Brown* (1985) 40 Cal.3d 512 in *California v. Brown*, (1987)__U.S.__, [107 S.Ct. 837] this Court did not thereafter issue

a supplemental opinion which either declared *People v. Brown* a "nullity" or one which reiterated the views of this Court as expressed therein; *Brown* remained a viable precedent on those grounds not covered by the reversal.

In *Hamilton II*, this Court cited *Brown, supra*, as, "*People v. Brown* (1985) 40 Cal.3d 512, 538-544, **reversed on there grounds, sub nomine** *California v. Brown* (1987) __U.S.__ [107 S.Ct. 837]." (emphasis added) If it is a valid assertion that *Hamilton I* is a "nullity" because the judgment was vacated and remanded for further consideration in light of *Rose v. Clark*, would not *Brown, supra*, which was simply reversed, be equally nullified? The answer is obvious. Even if the Supreme Court's action in the instant case was the functional equivalent of a summary reversal, which it was not, it did not affect any issue decided in *Hamilton I* except insofar as the harmless error test of *Rose v. Clark* might have any bearing on this Court's assessment of the prejudicial effect of the *Carlos* error in *Hamilton I*.

II

THIS COURT SHOULD GRANT APPELLANT'S PETITION FOR REHEARING BECAUSE WHEN THIS COURT ISSUED ITS OPINION IN *HAMILTON II*, IT WAS WITHOUT JURISDICTION TO CONSIDER ANY ISSUE OTHER THAN THE IMPACT OF *ROSE V. CLARK*, IF ANY, ON APPELLANT'S CASE

California Rule of Court 24 (a) provides that,

> "A decision of the Supreme Court becomes final 30 days after filing...When a decision of a reviewing court is final as to that court, it is not thereafter subject to modification or rehearing by that court..."

Consequently, it is clear that this Court's jurisdiction in appellant's case is limited to the impact, if any, of *Rose v. Clark* on appellant's case. Because this issue has been extensively briefed in previous supplemental

briefs submitted to this Court, no purpose would be served by reiterating the points therein raised.

IV

THIS COURT SHOULD GRANT A REHEARING OF APPELLANT'S CASE BECAUSE THE COURT'S OPINION DID NOT TAKE INTO CONSIDERATION THE FULL EXTENT OF THE PROSECUTOR'S MISLEADING REMARKS TO THE JURY EMPHASIZING THE UNCONSTITUTIONAL "MANDATORY" SENTENCING LANGUAGE OF CALJIC 8.84.2

At the conclusion of the penalty phase of appellant's trial, the jurors were instructed in the language of former CALJIC 8.84.2 that,

> "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you **shall** impose a sentence of death." (emphasis added)

This court held in *People v. Brown* (1985) 40 Cal.3d 512, 538-544 that CALJIC 8.84.2 was misleading in that it might suggest to a juror that if he or she found that the mitigating factors were outweighed by the factors in aggravation, the juror was compelled to vote for death even though the juror felt that, under the circumstances, death was not the appropriate punishment.

Prosecutor's comments on mandatory sentencing

In cases subsequent to *Brown, supra*, the Court has looked to the closing argument of the prosecutor to determine if the prosecutor exploited this constitutional infirmity to the prejudice of appellant, or, if he corrected any misimpression the jurors might have by informing them that even if they found that the aggravating factors outweighed those in mitigation, they could still vote for life imprisonment if they thought that it was the appropriate punishment.

In the case at bar, the Court's opinion indicates that the prosecutor only "referred briefly to the mandatory sentencing language" and that he "clearly acknowledged" that they had discretion "to make the tremendous decision, tough decision." (Slip op. 30)

The Court's opinion refers only to the tip of the iceberg of the prosecutor's prejudicial remarks to the jury. The references made by the prosecutor to the mandatory sentencing instruction were not, "brief and mild," but were extensive, categorical, and unqualified. Most significantly, the Court's opinion fails to consider the prosecutor's extraction of promises from the jurors during voir dire to abide by the prosecutor's mandatory sentencing formula if a penalty trial occurred.

Voir dire

During voir dire, the prosecutor told eleven out of twelve jurors who rendered verdicts in appellant's case that the law required that if they found that the aggravating factors outweighed those in mitigation they **must** vote for the death penalty. Moreover, each juror was then asked to promise the prosecutor that if the factors in aggravation outweighed those in mitigation, **they would impose the death penalty.** Naturally, when asked, they promised.

The questioning of juror Garfield Winters is illustrative. The prosecutor first explained that evidence in aggravation was evidence against the defendant and that evidence in mitigation was evidence that was favorable to the defendant. He then asked Mr. Winters,

"Q. [Y]ou...understand that in your judgment, yours and the other jurors if the evidence against the defendant outweighs the evidence in favor of him, **there is no way around it**, then you have to bring back a verdict of death.
A. Yes.
Q. Is that your understanding?

A. Yes.
Q. Are you willing to do that if that's how it turns out?
A. Yes." (R.T. 650) (emphasis added)

Similarly, the prosecutor told juror Sylvia Bania that the judge

"Q. ...will also instruct you that in the event the evidence in aggravation outweighs the evidence in mitigation, that you must bring back a verdict of death?
A. Yes.
Q. All right. In other words, the standard is set, then.
A. Yes
Q. In other words, if you find one of those, **you are bound to that verdict?**
A. Right. (R.T. 1200-1201)"[1]

All the jurors so asked gave the prosecutor their solemn assurance that they would follow the mandatory sentencing scheme as outlined by the prosecutor; they told him that it was understood that they had no choice but to impose the death penalty if they found that the aggravating circumstances outweighed those in mitigation.

Most significantly, neither the judge nor the defense attorney at any time suggested that the jurors' obligation was anything different from that which the prosecutor stated.

Closing argument

Given the mandatory sentencing catechism that occurred during voir dire, it was unnecessary for the prosecution to engage in any extended discussion of the meaning of CALJIC 8.84.2 as did the prosecutor in *People v. Milner* (1988) _Cal.3d_ to create extensive prejudice; all the prosecutor had to do was to remind the jurors of the assurances previously given during voir dire to reactivate their promises to adhere to the prosecutor's unconstitutional mandatory sentencing formula.

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[1] A similar promises were posed to all the other jurors except Henry Berry Jr. who was the first to be voir dired of those eventually selected: David Bergman (R.T. 879:1), Orlow Garrett (R.T. 1435:17), Jose Leal (R.T. 1247:23), Dathelma McNaught-Davis (R.T. 484:11), Ronald Orton (R.T. 1518:18), Kimberly Otto (R.T.740:1), Martha Penny (R.T. 1477:25), Louis Perez (670:8), and Sandra Sheffield (R.T. 750:20).

> "Now remember at the time of the voir dire you all promised that in the event that this case when to a penalty phase and the aggravation evidence outweighed the mitigation evidence, you would impose the death penalty. Well, that is the case here, and now is the time. You should not let sympathy for the defendant or his family affect your deliberations." (R.T. 4642)

Significantly, at no time during his closing argument did the prosecutor ever suggest to the jurors that their job was not to mechanically impose the death penalty, but, rather, after the weighing process was concluded, to determine if death was the appropriate punishment. Far from correcting, or in any way modifying the mandatory language of CALJIC 8.84.2, **every time** the prosecutor touched upon the subject of the jury's sentencing responsibilities, the prosecutor exploited that mandatory language and hammered away at one insistent theme: if aggravation outweighed mitigation, then it was the jury's legal obligation to impose the death penalty.

At the outset, the prosecutor told the jury that their task was to,

> "consider evidence from both the guilt phase and the penalty phase to determine whether or not the aggravation outweighs the mitigation." (R.T. 4621)

Later on, he told the jury that imposition of the death penalty was a foregone conclusion because of the overwhelming nature of the aggravating evidence.

> "How about all the terror she went through during the perpetration of that robbery and kidnapping before she was finally slaughtered. Right there we could stop. There is more than enough aggravation to inflict the death penalty, because right there it outweighs whatever they could put into mitigation." (R.T. 4623-4624)

Again he told the jury that if aggravation outweighed mitigation, their job was to impose the death penalty.

> "So, ladies and gentlemen, you are the ones who have to add up and come to the total, how does the alleged mitigation stack up against the overwhelming aggravation. In Latin there is a phrase nolo

> contendere. Do you know what that means? No contest. And that is exactly what it is." (R.T. 4641)

Finally, as indicated *supra*, the prosecutor recalled the jurors' promise to impose the death penalty if the aggravating factors outweighed the mitigating factors.

> "Well, that is the case here, and now is the time. You should not let sympathy for the defendant or his family affect your deliberations." (R.T. 4642)

The prosecutor reminded the jurors of their commitment to vote for the death penalty, as though they were delegates to a political convention, and he was the candidate's floor manager calling in his markers.

Against this backdrop of individual indoctrination during voir dire and unrepentant closing argument, the "ameliorative" aspects of the prosecutor's presentation to the jury noted in the Court's opinion are paltry indeed.

Discretion

The sole reference to the jurors' "discretion" is contained in the second paragraph of the prosecutor's introductory remarks, wherein he informed the jurors that,

> "The issue of determining the punishment for these horrendous crimes rests in your **discretion**, guided by some factors, but not limited to those factors, that will be given to you by the court."

It would be unreasonable to assume that lay persons on the jury would be able to divine the subtle concepts advanced by this Court in *Brown, supra*, from this throw away line in first few moments of the prosecutor's closing argument.

"Tremendous decision, tough decision"

The reference to the "tremendous decision, tough decision" did not precede the reference to "discretion" as suggested by the Court's opinion,

but followed it and in no way represented an amelioration of the language of CALJIC 8.84.2. Rather, it was simply unremarkable introductory language to an argument asking jurors to make an important decision. It cannot be reasonably transmigrated into language that informed the jurors that CALJIC 8.84.2,

> "should not be understood to require any juror to vote for the death penalty unless, upon completion of the 'weighing' process, he decides that death is the appropriate punishment under all the circumstances." *Brown, supra* 40 Cal.3d at 541

Defense counsel's argument

Before responding to the Court's reference to defense counsel's argument, appellant is obliged to point out that there is a conceptual problem with relying on defense counsel's closing argument to ameliorate the prejudicial impact of the trial court's instructions. On the one hand, a juror might give weight to an argument by the prosecutor that he was asking for the death penalty only if the jury found that, under all the circumstances, it was appropriate, because he is the one who is asking the jury to impose the death penalty; a juror might reason that if the prosecutor is not demanding that the death penalty be mechanically imposed if aggravation outweighs mitigation as the court's instructions seem to suggest, since it is he who is asking for the death penalty, his interpretation of the court's instructions should be followed.

However, defense counsel's argument comes before the jury in an entirely different posture. He's trying to save his client's life. If he says that the law requires more than the judge instructs, it is not a concession "against interest" as it would be if the same language came from the prosecutor. Moreover, CALJIC 1.00 and 1.02 make it quite clear that it is the judge, not counsel, who states the applicable law.

The Court's opinion suggests that defense counsel's argument that, "it was the responsibility of the jurors, and the jurors alone, to determine whether the death penalty was appropriate for defendant" (Slip op. 30) had some impact on assessing the prejudicial impact of CALJIC 8.84.2. It is hard to see how.

Though the Court's opinion cites no page reference, there is only one passage which has language arguably reflecting the Court's synopsis of defense counsel's argument.

> "[I]t is for you the jury to determine the appropriate punishment . If you find that one single factor in mitigation is sufficient to return a verdict of life without possibility of parole, that is your choice." (R.T. 4650)

This can hardly be said to inform the jury that even if the aggravation outweighs the mitigation, a juror is not required to vote for the death penalty, "unless, upon completion of the 'weighing' process, he decides that death is the appropriate punishment under all the circumstances." *Brown, supra* 40 Cal.3d at 541 This is particularly true in light of the fact that defense counsel was at most arguing to the jury to conduct its penalty determination in a particular way in contrast to the prosecutor who had previously obtained promises from the jury to do just the opposite.

Instructions

Similarly, neither of the instructions quoted by the Court in its opinion convey the essence of the *Brown* analysis quoted above. As this Court pointed out in *People v. Allen* (1986) 42 Cal.3d 1222, and reiterated more recently in *People v. Myers* (1987) 43 Cal.3d 250, the holding of *Brown, supra* was expressed in a two stage analysis.

> "First, we pointed our that the jury might be confused about the nature of the weighing process. As we observed: '[T]he word "weighing" is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for mere mechanical counting of factors on each side of the imaginary "scale," or the arbitrary assignment of "weights" to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the factors he is permitted to consider.'
>
> Second, we were concerned in *Brown* that the unadorned instruction's phrase, 'the trier of fact...*shall* impose a sentence of death if [it] concludes that the aggravating circumstances outweigh the mitigating circumstances' (emphasis added), could mislead the jury as to the ultimate question it was called on to answer in determining which sentence to impose. Although the quoted phrase could be understood to require a juror (i) to determine whether 'the aggravating circumstances outweigh the mitigating circumstances' without regard to the juror's personal views as to the appropriate sentence, and then (ii) to impose a sentence of death if aggravation outweighs mitigation even if the juror does not personally believe that death is the appropriate sentence under all the circumstances, we concluded in *Brown* that the statute was not intended to, and should not, be interpreted in that fashion. Instead we stated: 'By directing that the jury "shall" impose the death penalty if it finds that aggravating factors "outweigh" mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the weighing process, *he decides that death is the appropriate penalty under all the circumstances.*"

In the case at bar, both instructions only deal with the first prong of the *Brown* analysis, namely the weight to be given to the individual factors. The first quoted instruction merely told the jurors that it is not the numbers of aggravating or mitigating factors that count, but that they were

to consider, "the factors on each side as a whole." They were also told that they must be convinced beyond a reasonable doubt that the, "totality of aggravating circumstances outweigh[s] the totality of the mitigating circumstances."

However, the jurors were never instructed in accordance with the second prong of *Brown, supra*, namely that after the weighing process was complete, they must, "decide[] that death is the appropriate penalty under all the circumstances." In many respects, the situation in appellant's case is similar to that of the defendant in *Meyers, supra*. In that case, the Court found that it was unlikely that the jury was confused as to the nature of the weighing process, but found that they were misled as to their ultimate responsibility once the weighing process was complete. Compare, for example, the following passages from the prosecutor's closing argument in Meyers, *supra*, with the closing argument in the case at bar.

People v. Myers
"Once you determine, once you make a determination as to whether or not the aggravating circumstances...outweigh those in mitigation or the mitigating circumstances...outweigh those in aggravation, then the law says what verdict you shall return"

People v. Hamilton
"Now remember at the time of the voir dire you all promised that in the event that this case when to a penalty phase and the aggravation evidence outweighed the mitigation evidence, you would impose the death penalty. Well, that is the case here, and now is the time."

Conclusion

The prosecutor sought to extract full advantage from the mandatory sentencing instruction starting with voir dire and continuing through closing argument. During voir dire he told the jurors that they had no choice once they found that aggravating circumstances outweighed those in mitigation - they were legally required to impose a sentence of death. Moreover, without objection or correction by either defense counsel or the trial court, he asked the jurors to promise him that they would impose the death penalty if that turned out to be the case.

In argument, the prosecutor conceded nothing, told the jurors that aggravating factors clearly outweighed those in mitigation, and reminded them that they promised him in voir dire that if that they would live up to their legal obligation and impose the death penalty.

Defense counsel said nothing to contradict the mandatory gloss of the prosecutor's argument and the trial court's instructions did not suggest that there was any alternative open to the jurors other than a verdict of death once they found that the factors in aggravation outweighed those in mitigation.

Appellant was prejudiced by the reading of CALJIC 8.84.2 and that prejudice was compounded, not ameliorated, by the prosecutor's remarks.

VII

THE COURT SHOULD GRANT APPELLANT'S PETITION FOR A REHEARING ON THE GROUNDS THAT ITS HOLDING THAT THE GUILT AND PENALTY TRIALS ARE PART OF A UNITARY AND INDIVISIBLE

PROCESS FOR THE PURPOSES OF DETERMINING THE TIMELINESS OF APPELLANT'S PENALTY PHASE *PRO PER* MOTION CONFLICTS WITH THE HOLDING OF *BULLINGTON V. MISSOURI* (1981) 451 U.S. 430

A

APPELLANT HAD AN ABSOLUTE RIGHT TO REPRESENT HIMSELF AT THE PENALTY PHASE BECAUSE, FOR THE PURPOSES OF THE TIMELINESS OF APPELLANT'S REQUEST TO BE HIS OWN LAWYER, THE PENALTY PHASE IS A SEPARATE TRIAL

In its opinion in appellant's case, this Court held that appellant's motion to represent himself at the penalty phase of his trial was properly denied by the trial court because appellant's motion was made, "in the midst of the jury's guilt phase deliberations" and therefore, "it was not timely for the purposes of invoking an absolute right of self representation." (Slip. op. 26)

In support of its conclusion that the penalty phase was but, "a stage in a unitary capital trial," (Slip. op. 26-27) the Court cites Penal Code §§ 190.4(c) and 190.4 (d) which require the jury that determined appellant's guilt to determine penalty, and to use the evidence presented at the trial of appellant's guilt in determining the appropriate penalty. While these statutes do envision a unitary capital procedure, in *Bullington v. Missouri* (1981) 451 U.S. 430, the United States Supreme Court has made it clear that such labels are not determinative where constitutional issues are at stake.

In *Bullington, supra*, the defendant had been tried and convicted of "capital murder" under a Missouri statute very similar to California's statutory scheme. The Missouri law provided that, after the guilty verdict,

> "the court shall resume the trial and conduct a presentence hearing before the jury...at which time the only issue shall be the determination of the punishment to be imposed. In such hearing, subject to the laws of evidence, the jury...shall hear additional evidence in extenuation, mitigation, and aggravation..." Mo. Rev. Stat. § 565.006.

In *Bullington*, the jury set the punishment at life. The defendant then moved for and was granted a new trial based upon jury selection issues. The prosecutor indicated that he would be seeking the death penalty again and the defendant sought pretrial review which led to the granting of certiorari by the United States Supreme Court.

In its opinion, the Court held that the Double Jeopardy clause applied to the first jury's determination that the punishment should be life because, unlike other sentencing procedures,

> "[t]he presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. **It was itself a trial on the issue of punishment** so precisely defined by the Missouri statutes." *Id.* at 437 (emphasis added)

A similar result was reached a few years later in *Arizona v. Rumsey* (1984) 467 U.S. 203, applying the principles of *Bullington*, *supra*, to the Arizona capital statute. See also *Young v. Kemp* (11th Cir. 1985) 760 F.2d 1097, 1106 (applying *Burlington* to the Georgia capital statute); *Jones v. Thigpen* (5th Cir. 1984) 741 F.2d 805, 814, *remanded on other grounds*, 106 S.Ct. 689 (1986) ("After *Bullington*, a capital sentencing proceding like Mississippi's is regarded as a second 'trial' at which the prosecution must again 'prove its case' if it is to obtain a death sentence.")

The obvious import of the *Bullington* rationale to a *Faretta* [2]issue at the penalty stage has already been commented on by two members of the United States Supreme Court. Speaking for Justice Brennan and himself, Justice Marshall noted the applicability of the *Bullington* rationale to a Maryland defendant who represented himself at the guilt trial and then sought to have counsel appointed to represent him at the penalty trial.

[2] *Faretta v. California* (1974) 422 U.S. 806

Grandison v. Maryland (1986) 93 L.Ed.2d 174 *cert. den.*, Marshall, J. dissenting.

> "In *Bullington v. Missouri*,...this Court held that the Double Jeopardy clause applied to the sentencing phase of a bifurcated trial. It did so because it found that a sentencing hearing was like a separate trial....It may require selection of a new jury[3]...Evidence is offered...; the parties may present argument...; the jury is instructed,...; and the jury deliberates and determines sentence. The Maryland proceeding is in all respects a separate trial on the issue of punishment. **The waiver of the right to counsel at the first 'trial on guilt or innocence should therefore have no more bearing on a defendant's right to counsel in the sentencing phase that it would on that defendant's right to counsel in a separate trial on related crimes.** It should under no circumstances irrevocably bind a defendant in the sentencing phase." *Id.* at 175-176 (emphasis added)

B

EVEN ASSUMING THAT APPELLANT'S RIGHT TO SELF REPRESENTATION WAS LESS THAN ABSOLUTE WHEN ASSERTED BEFORE THE COMMENCEMENT OF THE PENALTY PHASE, THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO ALLOW APPELLANT TO BE HIS OWN LAWYER

At the outset, it should be noted that when the United States Supreme Court described the right of a criminal defendant to represent himself, it did so in unequivocal terms.

> "[T]he right of self-representation - to make one's own defense personally - is...necessarily implied by the structure of the [Sixth] Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." *Faretta, supra*, 422 U.S. at 804-805

Though the question of timeliness was not before the Court in that case (Faretta made his motion to represent himself weeks before the trial started), the **only** qualification imposed by the United States Supreme Court on the federal constitutional right of self representation is that a

[3] In the event of the discharge of the guilt phase jury for cause, and where guilt was established by plea or by bench trial.

defendant acting as his own counsel must abide by the rules of the trial court.[4]

The trial court appears to have relied on certain factors enumerated in *People v. Windham* (1977) 19 Cal.3d 121 that conflict with federal constitutional standards and other factors which are unauthorized under any accepted state or federal standard of review.

In *Windham, supra*, the Court set out the factors to be considered in evaluating a defendant's mid trial request to act as his own lawyer.

> "[1] [T]he quality of counsel's representation of the defendant, [2] the defendant's prior proclivity to substitute counsel, [3] the reasons for the request, [4] the length and stage of the proceedings, and [5] the disruption or delay which might reasonably be expected to follow the granting of such a motion." *Id.* 19 Cal.3d at 128

There are seven paragraphs of reasons cited by the trial court justifying its decision to deny appellant the right to be his own lawyer. Four of the seven concern the shackling of appellant which this Court characterized as "irrelevant." (Slip op. 26) One paragraph concerns the trial court's admiration for the good job done by appellant's counsel and one paragraph concerns the trial court's view of appellant's trial tactics. [5]

1. The quality of counsel's representation of defendant. This is an improper consideration under the constitutional standards laid down by *Faretta, supra*. The Supreme Court assumed that it was, "undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance that by their own unskilled efforts" (*Id.* at 805) but, in spite of that consideration, held that a defendant still had the right to represent himself.

Consequently, the trial court's observation that appellant's counsel had, "done an outstanding job in their representation of the defendant..." is manifestly irrelevant in an evaluation of a request for self representation.

2. The defendant's prior proclivity to substitute counsel. While this factor might be of consequence in resolving a *Marsden*[6] motion, it is only tangentially relevant in the instant situation. A defendant's right to be his own lawyer is not derivative from his right to waive representation by counsel or substitute one counsel for another. As the Court noted in *Faretta, supra*,

> "Our concern is with an *independent* right of self representation. We do not suggest that this right arises mechanically from a defendant s power to waive the right to the assistance of counsel." *Id.* 422 U.S. at 804-805 f. 15

3. The reasons for the request. Again, this factor is of little or no constitutional significance in appellant's case. (*Windham, supra*, 19 Cal. 3d. at 128, f. 5) A defendant may have a multitude of reasons why he wants to be his own lawyer; some cognizable in legal parlance, others in inchoate form. However, so long as a defendant, "is made aware of the dangers and disadvantages of self representation" *Faretta, supra*, 422 U.S. at 835, and the trial court is satisfied that the assertion of the right is done in a "knowing and intelligent[]" manner, a defendant has a constitutional right to be his own lawyer, regardless of the reasons for his decision. Clearly, appellant was making a knowing choice.

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[4] "The right of self representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." *Id.* at 835, f.46

[5] The trial court's reference to appellant's "trial tactics" as "preposterous" and the comment that if appellant "had followed those tactics..the result would have been absolutely disastrous" (Slip op. p. 24) is curious. Defendant was convicted of every thing he was charged with and sentenced to death. How much worse could appellant have done if he had represented himself?

[6] *People v. Marsden* (1970) 2 Cal.3d 118

4. The length and stage of the proceedings. Appellant's motion was made in between the guilt phase and the penalty phase and hence, this factor is of little relevance

5. The disruption or delay which might reasonably be expected to follow the granting of such a motion. In the case at bar, appellant specifically told the trial court that he was not asking for a delay in the procedings in order tc proceed in *pro per*. As this Court was careful to note in *Windham, supra*,

> "Our imposition of a 'reasonable time' requirement should not be, must not be used as a means of limiting a defendant's *constitutional* right of self representation. **We intend only that a defendant should not be allowed to misuse the *Faretta* mandate as a means to unjustifiably delay a scheduled trial or to obstruct the orderly administration of justice.**" *Id.* 19 Cal.3d at 128, f. 5 (emphasis added)

Given the absence of **any** "delay [of] a scheduled trial," the trial court's abuse of discretion was manifest.

That leaves the one paragraph where the trial court finds it inconceivable that appellant could represent himself in the penalty phase. Inability on the part of the trial court to conceptualize appellant pleading for his life to a jury is not a constitutionally permissible reason to deny appellant his right to be his own lawyer.

C.

CONCLUSION

The right of a defendant to represent himself is of particular importance when it is asserted prior to the commencement of the penalty phase. If the right of self representation means anything, it means that a defendant can plead for his life through his own words directly to the jurors who have his fate in their hands.

The United States Supreme Court has definitively ruled that state characterizations of trial procedings as "unitary" are not controlling when constitutional rights are infringed. In two decisions construing statutes similar to California's, the court has held the penalty phase to be a separate trial. Given the fact that appellant asserted his right before the penalty trial began, this Court should grant appellant's petition for a rehearing.

Order Denying Rehearing and Final Judgment

Order Due

ORDER DENYING REHEARING

No. S001870 - S004363

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE, Respondent

v.

BERNARD LEE HAMILTON, Appellant

IN RE BERNARD LEE HAMILTON ON HABEAS CORPUS

petitions for rehearing DENIED.

The motion to file additional briefing is denied.

Opinion modified.

Broussard, J. is of the opinion the; petition should be granted.

Chief Justice

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IN THE

Supreme Court of the State of California

REMITTITUR

No. S004363 (CR21958)

THE PEOPLE,
Plaintiff & Respondent,

vs.

BERNARD LEE HAMILTON,
Defendant & Appellant.

SUPERIOR COURT NO. 47283

The above-entitled cause having been heretofore fully argued, and submitted,

IT IS ORDERED, ADJUDGED, AND DECREED *by the Court that the* judgment of the Superior Court of the County of San Diego in the above-entitled cause, is hereby affirmed.

I, LAURENCE P. GILL, *Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the* 19th *day of* May, *19* 88.

WITNESS *my hand and the seal of the Court,*
this 28th *day of* July, *19* 88.

SEAL

LAURENCE P. GILL
Clerk

By KENNETH A. WAGOVICH
Deputy

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Order of Hon. Sandra Day O'Connor Extending Time in Which File Petition for Writ of Certiorari

Supreme Court of the United States

No.
A-220

Bernard Lee Hamilton,
Petitioner

v.

California

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including October 26, 1988.

s/ Sandra D. O'Connor
Associate Justice of the Supreme Court of the United States

Dated this 19th day of September, 1988.

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California Pen. Code 187 *et seq.*

California Rules of Court 24(a)

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Intent to Murder.

10. Libel. §§ 248–257. [Repealed]
11. Slander. §§ 258–260.

Cal Jur 3d (Rev) Criminal Law §§ 180 et seq., Witkin Crimes pp 270 et seq.

CHAPTER 1
Homicide

§ 187. [Murder defined] (a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

(b) This section shall not apply to any person who commits an act which results in the death of a fetus if any of the following apply:

(1) The act complied with the Therapeutic Abortion Act, Chapter 11 (commencing with Section 25950) of Division 20 of the Health and Safety Code.

(2) The act was committed by a holder of a physician's and surgeon's certificate, as defined in the Business and Professions Code, in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not.

(3) The act was solicited, aided, abetted, or consented to by the mother of the fetus.

(c) Subdivision (b) shall not be construed to prohibit the prosecution of any person under any other provision of law. [1872; 1970 ch 1311 § 1.] *Cal Jur 3d (Rev) Criminal Law §§ 124, 180 et seq. 197, 245, 354, 355, 360, 382, 2014, 2740, 2747, 2823, 2838, 3183, 3224; Witkin Crimes pp 271 et seq., 289; Criminal Procedure pp 179, 189.*

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§ 188. [Malice defined] Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

When it is shown that the killing resulted from the intentional doing of an act with express or implied malice as defined above, no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice. [1872; 1981 ch 404 § 6; 1982 ch 893 § 4.] *Cal Jur 3d (Rev) Criminal Law §§ 90, 201 et seq., 247, 382, 2014, 2301; Witkin Crimes pp 274 et seq., 289 et seq.; Procedure (3d) Plead § 416.*

§ 189. [Degrees of murder] All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree.

As used in this section, "destructive device" shall mean any destructive device as defined in Section 12301, and "explosive" shall mean any explosive as defined in Section 12000 of the Health and Safety Code.

To prove the killing was "deliberate and premeditated," it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act. [1872; 1873–74 ch 614 § 16; 1949 ch 16 § 1; 1969 ch 923 § 1; 1970 ch 771 § 3; 1981 ch 404 § 7; 1982 ch 949 § 1, effective September 13, 1982, ch 950 § 1, effective September 13, 1982.] *Cal Jur 3d Appellate Review §§ 546, 547, Statutes §§ 130, 165, 166; Cal Jur 3d (Rev) Criminal Law §§ 76, 207, 208, 211, 213, 215, 219, 224, 229, 230 et seq., 347, 350, 352, 353, 354, 369, 409, 2151, 2301, 2744; Witkin Crimes pp 273, 278, 281, 283, 284, 289, 296, 302, 427.*

§ 190. [Operative term contingent] [Punishment for murder] (a) Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in the state prison for a term of 25 years to life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

Except as provided in subdivision (b), every person guilty of murder in the second degree shall suffer confinement in the state prison for a term of 15 years to life.

The provisions of Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 of the Penal Code shall apply to reduce any minimum term of 25 or 15 years in a state prison imposed pursuant to this section, but such person shall not otherwise be released on parole prior to such time.

(b) Every person guilty of murder in the second degree shall suffer confinement in the state prison for a term of 25 years to life if the victim was a peace officer, as defined in subdivision (a) of Section 830.1, subdivision (a) or (b) of Section 830.2, or Section 830.5, who was killed while engaged in the performance of his or her duties, and the defendant knew or reasonably should have known that the victim was such a peace officer engaged in the performance of his or her duties.

The provisions of Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 of the Penal Code shall not apply to reduce any minimum term of 25 years in state prison when the person is guilty of murder in the second degree and the victim was a peace officer, as defined in this subdivision, and such person shall not be released prior to serving 25 years confinement. Amended Stats 1987 ch 1006 § 1. *Cal Jur 3d (Rev) Criminal Law §§ 200, 3342 et seq.; Witkin Crimes pp 271, 972, 975–977, 986; Criminal Procedure pp 335, 400.*

§ 190.05. [Penalty for second degree murder when defendant served prior prison term for murder; Procedure] (a) The penalty for a defendant found guilty of murder in the second degree, who has served a prior prison term for murder in the first or second degree, shall be confinement in the state prison for a term of life without the possibility of parole or confinement in the state prison for a term of 15 years to life. For purposes of this section, a prior prison term for murder of the first or second degree is that time period in which a defendant has spent actually incarcerated for his or her offense prior to release on parole.

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(b) A prior prison term for murder for purposes of this section includes either of the following:

(1) A prison term served in any state prison or federal penal institution, including confinement in a hospital or other institution or facility credited as service of prison time in the jurisdiction of confinement, as punishment for the commission of an offense which includes all of the elements of murder in the first or second degree as defined under California law.

(2) Incarceration at a facility operated by the Youth Authority for murder of the first or second degree when the person was subject to the custody, control, and discipline of the Director of Corrections.

(c) The fact of a prior prison term for murder in the first or second degree shall be alleged in the accusatory pleading, and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by a plea of guilty or nolo contendere or by trial by the court sitting without a jury.

(d) In case of a reasonable doubt as to whether the defendant served a prior prison term for murder in the first or second degree, the defendant is entitled to a finding that the allegation is not true.

(e) If the trier of fact finds that the defendant has served a prior prison term for murder in the first or second degree, there shall be a separate penalty hearing before the same trier of fact, except as provided in subdivision (f).

(f) If the defendant was convicted by the court sitting without a jury, the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty or nolo contendere, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.

If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If the new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in the state prison for a term of 15 years to life.

(g) Evidence presented at any prior phase of the trial, including any proceeding under a plea of not guilty by reason of insanity pursuant to Section 1026, shall be considered at any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

(h) In the proceeding on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition, and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or the prior prison term for murder of the first or second degree which subjects a defendant to the punishment of life without the possibility of parole, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(1) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of the prior prison term for murder.

(2) The presence or absence of criminal

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activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(3) The presence or absence of any prior felony conviction.

(4) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(5) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(6) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his or her conduct.

(7) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(8) Whether or not at the time of the offense the ability of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication.

(9) The age of the defendant at the time of the crime.

(10) Whether or not the defendant was an accomplice to the offense and his or her participation in the commission of the offense was relatively minor.

(11) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of life without the possibility of parole if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances, the trier of fact shall impose a sentence of confinement in the state prison for 15 years to life.

(i) Nothing in this section shall be construed to prohibit the charging of finding of any special circumstance pursuant to Sections 190.1, 190.2, 190.3, 190.4, and 190.5. Added Stats 1985 ch 1510 § 1.

§ 190.1. [Procedure in case involving death penalty.] A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows:

(a) The question of the defendant's guilt shall first be determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in Section 190.2 except for a special circumstance charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 where it is alleged that the defendant had been convicted in a prior proceeding of the offense of murder in the first or second degree.

(b) If the defendant is found guilty of first degree murder and one of the special circumstances is charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 which charges that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree, there shall thereupon be further proceedings on the question of the truth of such special circumstance.

(c) If the defendant is found guilty of first degree murder and one or more special circumstances as enumerated in Section 190.2 has been charged and found to be true, his sanity on any plea of not guilty by reason of insanity under Section 1026 shall be determined as provided in Section 190.4. If he is found to be sane, there shall thereupon be further proceedings on the question of the penalty to be imposed. Such proceedings shall be conducted in accordance with the provisions of Sections 190.3 and 190.4. [Initiative adopted November 7, 1978.] *Cal Jur 3d (Rev) Criminal Law §§ 9, 3342 et seq.; Witkin Crimes pp 122, 271, 972, 973, 976, 977, 978, 979, 980, 982, 986; Criminal Procedure pp 521, 550.*

§ 190.2. [Mandatory penalty upon special findings.] (a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:

(1) The murder was intentional and carried out for financial gain.

(2) The defendant was previously convicted of murder in the first degree or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California

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would be punishable as first or second degree murder shall be deemed murder in the first or second degree.

(3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree.

(4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden or concealed in any place, area, dwelling, building or structure, and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest or to perfect, or attempt to perfect an escape from lawful custody.

(6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or cause to be mailed or delivered and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(7) The victim was a peace officer as defined in Section 830.1, 830.2, 830.3, 830.31, 830.35, 830.36, 830.4, 830.5, 830.5a, 830.6, 830.10, 830.11 or 830.12, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties; or the victim was a peace officer as defined in the above enumerated sections of the Penal Code, or a former peace officer under any of such sections, and was intentionally killed in retaliation for the performance of his official duties.

(8) The victim was a federal law enforcement officer or agent, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a federal law enforcement officer or agent, engaged in the performance of his duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his official duties.

(9) The victim was a fireman as defined in Section 245.1, who while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a fireman engaged in the performance of his duties.

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding, and the killing was not committed during the commission, or attempted commission or the crime to which he was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his testimony in any criminal proceeding.

(11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this state or any other state, or a federal prosecutor's office and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(12) The victim was a judge or former judge of any court of record in the local, state or federal system in the State of California or in any other state of the United States and the murder was carried out in retailiation for or to prevent the performance of the victim's official duties.

(13) The victim was an elected or appointed official or former official of the Federal Government, a local or State government of California, or of any local or state government of any other state in the United States and the killing was intentionally carried out in retaliation for or to prevent the performance of the victim's official duties.

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim while lying in wait.

(16) The victim was intentionally killed because of his race, color, religion [illegible]tionality or country of origin.

(17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:

(i) Robbery in violation of Section 211.

(ii) Kidnapping in violation of Sections 207 and 209.

(iii) Rape in violation of Section 261.

(iv) Sodomy in violation of Section 286.

(v) The performance of a lewd or lascivious act upon person of a child under the age of 14 in violation of Section 288.

(vi) Oral copulation in violation of Section 288a.

(vii) Burglary in the first or second degree in violation of Section 460.

(viii) Arson in violation of Section 447.

(ix) Train wrecking in violation of Section 219.

(18) The murder was intentional and involved the infliction of torture. For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration.

(19) The defendant intentionally killed the victim by the administration of poison.

(b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs (1), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), or (19) of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.

The penalty shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5. [Initiative adopted November 7, 1978.] *Cal Jur 3d (Rev) Criminal Law §§ 2788, 2791, 3136, 3342 et seq.; Witkin Crimes pp. 972 et seq.; Criminal Procedure pp. 521 et seq.*

§ 190.25. [Penalty for murder of transportation worker] (a) The penalty for a defendant found guilty of murder in the first degree shall be confinement in state prison for a term of life without the possibility of parole in any case in which any of the following special circumstances has been charged and specially found under Section 190.4, to be true: the victim was the operator or driver of a bus, taxicab, streetcar, cable car, trackless trolley, or other motor vehicle operated on land, including a vehicle operated on stationary rails or on a track or rail suspended in the air, used for the transportation of persons for hire, or the victim was a station agent or ticket agent for the entity providing such transportation, who, while engaged in the course of the performance of his or her duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was the operator or driver of a bus, taxicab, streetcar, cable car, trackless trolley, or other motor vehicle operated on land, including a vehicle operated on stationary rails or on a track or rail suspended in the air, used for the transportation of persons for hire, or was a station agent or ticket agent for the entity providing such transportation, engaged in the performance of his or her duties.

(b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.

(c) Nothing in this section shall be construed to prohibit the charging or finding of any special circumstance pursuant to Sections 190.1, 190.2, 190.3, 190.4, and 190.5. [1982 ch 172 § 1, effective April 27, 1982.] *Cal Jur 3d (Rev) Criminal Law §§ 3342 et seq.; Witkin Crimes pp 972 et seq.; Criminal Procedure p 521.*

§ 190.3. [Determination as to imposition of death penalty or life imprisonment upon finding of special circumstance: Admission of evidence.] If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code or Sections 37, 128, 219 or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

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However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole. [Initiative adopted November 7, 1978.] *Cal Jur 3d Penal and Correctional Institutions § 134; Cal Jur 3d (Rev) Criminal Law §§ 9, 377, 1724, 1784, 1868, 1870, 1905, 2014, 3342 et seq.; Witkin Criminal Procedure p 521.*

§ 190.4. [Special finding on truth of each alleged special circumstance.] (a) Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to Subdivision (b) of Section 190.1.

In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that is not true. The trier of fact shall make a special finding that each special circumstance

charged is either true or not true. Wherever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people.

If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, there shall be a separate penalty hearing, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of the separate penalty hearing.

In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach a unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by an unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and in the court's discretion shall either order a new jury impaneled to try the issues the previous jury was unable to reach the unanimous verdict on, or impose a punishment of confinement in state prison for a term of 25 years.

(b) If defendant was convicted by the court sitting without a jury the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.

If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole.

(c) If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to Section 1026, the truth of any special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.

(d) In any case in which the defendant may be subject to the death penalty, evidence presented at any prior phase of the trial, including any proceeding upon a plea of not guilty by reason of insanity pursuant to Section 1026 shall be considered on any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes. The denial of the modification of the death penalty verdict pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the People's

clerk may prescribe, but it shall notify each party that he must file with the clerk of the superior court a further notice specifying such of the designated original exhibits and affidavits as he deems necessary to have transmitted to the reviewing court. [Renumbered effective July 1, 1968; previously amended effective January 1, 1951.] *Cal Jur 3d Appellate Review §§ 393, 409, 412, 593, 594; Courts §§ 30, 31; Cal Practice §§ 61:283, 61:331, 61:336.*

Rule 21.5. "Circuit-riding" sessions

Each Court of Appeal shall adopt a written policy and procedure, not inconsistent with this rule, to facilitate sessions being held, for the convenience of the parties and counsel, at places within the district other than the court's permanent locations. Sessions may be held at any place where it appears that suitable facilities are available and a sufficient number of cases may be set for at least one day of hearings. [Adopted effective July 1, 1981.]

Rule 22. Oral argument

Unless otherwise ordered: (1) counsel for each party shall be allowed 30 minutes for oral argument, except that in a case in which a sentence of death has been imposed each party shall be allowed 45 minutes; (2) not more than one counsel on a side may be heard except that different counsel for the appellant or the moving party may make opening and closing arguments and in a case in which a sentence of death has been imposed two counsel may be heard in either opening or closing argument for each side; (3) each party and intervener who appeared separately in the court below may be heard by his or her own counsel; and (4) the appellant on a direct appeal or the moving party shall have the right to open and close. On Supreme Court review of a Court of Appeal decision, the petitioner for review is the moving party.

If two or more parties file notices of appeal or petitions for review, the court will indicate the order of argument. [As amended effective May 6, 1985; previously amended effective July 1, 1981.] *Cal Jur 3d Appellate Review § 146; Cal Practice §§ 61:348, 61:350.*

Rule 22.5. Time of submission of cause in Court of Appeal

(a) A cause pending in a Court of Appeal is submitted when the court has heard oral argument, or has approved a waiver of oral argument, and the time has passed for filing all briefs and papers, including any supplementary brief permitted by the court.

(b) Submission may be vacated only by an order stating the reasons therefor. The order shall provide for resubmission of the cause. [Adopted effective Sept. 1, 1978; applicable to all cases in which oral argument is held, or a waiver of oral argument is approved, after August 31, 1978.]

Rule 23. Findings and additional evidence on appeal

(a) [Request for findings] A request that the reviewing court make findings of fact shall contain a draft of the proposed findings, and may be made in a brief, or a separate application may be served and filed. If opposing counsel has not had an opportunity in his brief to object to the request, he may serve and file written opposition thereto.

(b) [Application to produce evidence] Proceedings for the production of additional evidence on appeal shall be in accordance with rule 41. The court may grant or deny the application in whole or in part, and subject to such conditions as it may deem proper. If the application is granted, the court, by appropriate order, shall direct that the evidence be taken before the court or a department or a justice thereof, or before a referee appointed for the purpose. The court shall also prescribe reasonable notice of the time and place for the taking of the evidence and shall indicate the issues on which the evidence is to be taken. Where documentary evidence is offered, either party may submit the original or a certified or photostatic copy thereof and the court may admit the document in evidence and add it to the record on appeal. [As amended effective January 1, 1967.] *Cal Jur 3d Appellate Review §§ 563, 565, 572, 574–576; Cal Practice Rev Ch 50 Findings of Fact and Conclusions of Law; Cal Practice §§ 61:317 et seq.*

Rule 23.5. Form of opinion

The opinion of a Court of Appeal shall identify the judges participating in the decision, including the author of the majority opinion and of any concurring or dissenting opinion, or the three judges participating when the opinion is designated "by the court." [Adopted effective January 1, 1982.]

Rule 24. Decision of reviewing court

(a) [When decisions become final] All decisions of the reviewing courts shall be filed with the clerk, who shall forthwith transmit a copy of the opinion to the lower court or tribunal and to the parties. A decision of the Supreme Court becomes final 30 days after filing unless the court orders a shorter time or, prior to the expiration of the 30-day period or any extension, orders one or more additional periods not to exceed a total of 60 additional days. A decision of a Court of Appeal becomes final as to that court 30 days after filing, except that the decision becomes final as to that court immediately after filing upon the denial of a petition for a writ within its original jurisdiction or a writ of supersedeas, without issuance of an alternative writ or order to show cause, or the denial of an application for bail or to reduce bail pending appeal, or the denial of a transfer to a Court of Appeal in a case within the original jurisdiction of a municipal or justice court. When a decision of a reviewing court is final as to that court, it is not thereafter subject to modification or rehearing by that court, except that when the date of finality falls on a holiday or other day the clerk's office is closed, the decision may be modified or rehearing granted until the close of business on the next day the clerk's office is open. Where an opinion is modified without change in the judgment, during the time allowed for rehearing, the modification shall not postpone the time that the decision becomes final as above provided; but if the judgment is modified during that time, the period specified herein begins to run anew, as of the date of modification. [As amended effective July 1, 1966; previously amended effective January 1, 1957, January 1, 1959, January 1, 1961, January 2, 1962, July 1, 1963, November 11, 1964, January 1, 1968, July 1, 1972, July 1, 1973, and July 1, 1984.]

(b) [Whether judgment is modified] An order modifying an opinion shall specify whether it effects a change in the judgment. [Adopted effective July 1, 1986.]

(c) [Filing consent to modification] If the reviewing court orders that a judgment be reversed and a new trial granted or that, in the alternative, the judgment be affirmed on condition that the party in whose favor judgment has been rendered consent to a remittitur of a portion thereof, or on condition that the party against whom the judgment has been rendered consent to an addition thereto, then, unless otherwise ordered, the judgment of reversal and granting of a new trial shall become final unless within 30 days after the filing of the decision 2 copies of a written consent by such party to the remittitur or addition shall be filed in the reviewing court. One of the copies shall be transmitted with the remittitur to the superior court. [As relettered effective July 1, 1986.]

(d) [Discretionary early finality] Notwithstanding sub-

ORIGINAL

No. 88-5746

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BERNARD LEE HAMILTON,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of California

BRIEF OF RESPONDENT IN OPPOSITION

JOHN K. VAN DE KAMP, Attorney General
of the State of California

STEVE WHITE,
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QUESTIONS PRESENTED

1. In view of the fact that the guilt phase had been affirmed, did the California Supreme Court's reconsideration of the entire case after this Court vacated the judgment and remanded for further consideration in light of Rose v. Clark (1986) 478 U.S. 570, prejudice petitioner in any way?

2. Where state law provides for a unitary trial in two phases, did denial of petitioner's motion to represent himself at the penalty phase abridge his Sixth Amendment right of self representation?

3. After informing the jury that any factor could be considered in mitigation did instructions and argument stating it must return a death verdict if the specified factors in aggravation outweighed all possible factors in mitigation mislead the jury regarding leniency?

PARTIES

Petitioner, Bernard Lee Hamilton, is a prisoner incarcerated under judgment of death at the California State Prison at San Quentin, California. Respondent is the People of the State of California.

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OPINION BELOW

Petitioner seeks review of an opinion of the California Supreme Court affirming his judgment of death. (People v. Hamilton (1988) 45 Cal.3d 351, as modified at 1034a upon denial of rehearing; attached in Appendix 1(a).)

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. section 1257(3).

CONSTITUTION, STATUTES AND PROVISIONS INVOLVED

United States Constitution, Sixth, Eighth and Fifteenth Amendments, and California Penal Code sections 190.3 and 190.4 subdivision (d). These provisions appear in Appendix 2 of the petition.

STATEMENT OF THE CASE

In an information filed by the District Attorney of San Diego County on July 11, 1979, petitioner was charged in four felony counts as follows: count I, vehicular burglary (Cal. Pen. Code, { 459); count II, robbery (Cal. Pen. Code, { 211); count III, kidnapping (Cal. Pen. Code, { 207); and count IV, murder under special circumstances. Allegations contended petitioner murdered Eleanor Buchanan during the commission of a robbery, kidnapping and/or burglary (Cal. Pen. Code, { 190.2). (CT 45-46.)[1/]

The information further alleged two prior felony convictions (a 1972 forgery and a 1973 burglary). (CT 45-46.) Petitioner was arraigned on July 16, 1979, and denied all charges, allegations and prior convictions. (CT 87.)

Jury trial began on November 3, 1980. (CT 1457.) On January 5, 1981, the jury convicted petitioner of burglary, robbery, kidnapping, and first-degree murder, and found all special circumstances true. (CT 1204-1210.) Thereafter, the penalty phase was held and the jury fixed the punishment at death. (CT 1335.)

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1. "CT" refers to the clerk's transcript and "RT" refers to the reporter's transcript of the trial.

Upon automatic appeal to the California Supreme Court, the judgment of guilt was affirmed, but the special circumstances and death penalty judgments were reversed. (People v. Hamilton (1985) 41 Cal.3d 408; Appendix 1(b).)

On May 7, 1986, the People filed a Petition for Writ of Certiorari. On July 7, 1986, this Court granted the petition, vacated the judgment and remanded the case to the California Supreme Court "for further consideration in light of Rose v. Clark (1986) 478 U.S. ___." (California v. Hamilton (1986) ___ U.S.___ [92 L.Ed.2d 734].) On September 2, 1986, the case was argued to the California Supreme Court, but no opinion was filed. On September 9, 1987, the case was re-argued to the California Supreme Court. On May 19, 1988, the California Supreme Court affirmed petitioner's convictions and death penalty. (People v. Hamilton/In re Hamilton (1988) 45 Cal.3d 351, as modified on July 28, 1988, in 46 Cal.3d 1034a.

Statement of Facts

On the evening of May 30, 1979, 24-year-old Eleanor Buchanan (the victim) had dinner with her husband and two infant sons, then left for school in their new van. They had purchased the van about six weeks earlier and her husband, a dental supply salesman, used it in his work during the day, carrying literature and samples. He told his wife there was very little gas in the van and not to add any because he was taking it to the dealer the next morning to replace the tank due to a leak.[2/] (RT 2079, 2077, 2099-2101, 2151.)

Mrs. Buchanan had given birth three weeks earlier and was nursing her baby. She cut chunks of diaper, put them over her nipples to keep milk from leaking on her clothes and left for school at 6:30 p.m. She was wearing tan Levi's, a striped beige

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2. All locks and windows worked and nothing was broken on the van when Buchanan turned it over to his wife. When respondent was arrested in it on June 8th, the arm rest of the driver's chair, the metal rod on the ceiling that holds the curtain suspended behind the driver and the wind wing on the passenger's side were all broken. (RT 2086, 2106-2107, 2573, 2577.)

and brown T-shirt, white knee socks, bra, panties and a simulated leather purse. (RT 2079, 2077, 2099-2101, 2151.)

Buchanan habitually locked the van, which had valuables in it including dental equipment from her husband's work. (RT 2146, 2150-2151, 2156, 2106, 2083.)

On May 30, 1979, she left her math class early after obtaining xeroxed class notes from fellow students because an optional quiz was offered and she had been absent for the birth of her three-week-old son. Students saw her walking towards the parking lot about 9:30 p.m. (RT 2160, 2162, 2171-2173, 2181-2183.)

At about 1:52 a.m. on May 31, 1979, petitioner called Donna Hatch in Terrell, Texas to say he had gotten a van and was leaving for Texas when he could get gas. (RT 2363-2364, 2444-2445.)

There was a gasoline shortage during this time and fuel was sold for limited hours. Between 4:30 a.m. and 10:15 a.m. on May 31, 1979, petitioner purchased gas for the Buchanans' van on their Visa card at Roy's Service Station off Highway 8 in El Cajon, California. He signed the invoice, "Terry Buchanan". (RT 2206-2207, 2210-2211.)

About noon on the same day, Eleanor Buchanan's headless, handless body was found in the grass near a cul-de-sac off Pine Valley Road near San Diego. The cul-de-sac was 200 yards off Interstate 8. The body was in full rigor mortis with the elbow in an upright position, completely off the ground, when a deputy sheriff arrived at the scene between 1:30 and 2:00 p.m. Two strings of twine were attached around Buchanan's ankles and there were dark blue pieces of lint sticking to her blood. The body was clothed in a bra, underpants and socks. The head and hands were never found. (RT 2278-2279, 2289-2290.)

During the autopsy, it was determined that a horizontal stab wound in the abdomen was inflicted before death. Three superficial wounds measuring up to five inches on the abdomen were inflicted after death. The pathologist could not determine

cause of death because of the absence of the head, but ruled out natural causes. He could not say whether the hands were cut off while Eleanor Buchanan was alive, but suspected she was dead because there was not much hemorrhaging. He could not say whether she was alive when the head was cut and sawed off. (RT 2337, 2333.) Judging from the rigor mortis, death occurred about 16 hours before the autopsy, about midnight on May 30, 1979. (RT 2340-2341.)

Meanwhile, petitioner continued to drive down Interstate 8 from San Diego to Texas. (RT 2216, 2223, 2258-2259, 2264-2265.) He arrived at Donna Hatch's home in Terrell, Texas, on the evening of June 1, 1979. He was alone. The van was dirty, had a broken arm on the driver's chair, a broken mirror and a broken wind wing. (RT 2364-2368.)

Petitioner was on bail pending trial on a robbery charge. (See RT 3563.) He took Donna with him to get addresses for his defense in that case. She saw the Buchanans' credit cards in the van and petitioner used them for food and gas. (RT 2369-2373, 2376.)

On June 3, 1979, Donna was in the van with petitioner and her daughter and saw a highway patrolman. When Donna suddenly turned, while talking to her little girl, petitioner told her not to make sudden moves because they could get shot. She asked why, but he gave no direct answer. Petitioner stopped at a pay phone to call his brother and his friend, Clifton. (RT 2376-2379.) Donna heard petitioner tell his brother he had flown to Texas. (RT 2380.)

Cliff Harris and petitioner knew each other all their lives and were good friends. (RT 2489.) Petitioner told Harris he drove to Texas in a blue El Dorado. Harris was watching TV as they spoke and saw a report that the headless body had been found. He told petitioner. (RT 2490-2492; 3594, 3596.)

Petitioner had changed when he returned to the van after talking to Clifton Harris. (RT 2380.) Donna asked what was wrong. Petitioner said he thought he killed a man. When

they returned to her home, petitioner said he would let the van sit a while to see if anyone paid attention to it and that he needed Texas license plates. He asked her to go to a car lot with him to get the plates, but she refused. (RT 2380-2381.)

The next day, Donna broke up with petitioner. Petitioner said if she had changed her mind because he had lied about his wife being dead, he would kill the ex-wife. (RT 2382.)

Petitioner called Donna on Wednesday, June 6, 1979, to discuss bringing her back to California to testify in his robbery case. (RT 2470-2471.) At one point, a friend of Donna's also got on the phone. Petitioner said, "I'm going to kill you and your friend, too. And you won't know when I'll be around because I don't have to be driving this van, I can be in another vehicle." (RT 2474.) Donna never saw petitioner after that phone call. (RT 2471-2472, 2382-2384, 2475.)

Petitioner continued to use the Buchanans' credit card. It was stipulated he charged a saw, screwdriver and set of wrenches at Babcock Auto Supply in Terrell, Texas, on June 6, 1979, (2518-2519), and a butcher knife and two hanks of twine at Moses five and ten cent store on June 7, 1979. (RT 2519-2520.)

At about 8:30 a.m. on June 8, 1979, petitioner entered Stuckey's restaurant in Marietta, Oklahoma. He charged food on Buchanans' Visa, picked up part of his food order and ran out as the manager was calling for authorization on the purchase. The manager called law enforcement authorities and described petitioner and the van. (RT 2746-2747, 2755-2757.)

That afternoon, petitioner was stopped by Oklahoma officers and they ran a VIN number check. They learned the van belonged to a homicide victim. The officers arrested petitioner on the local charges. (RT 2598-2599.)

On the way to jail, petitioner passed a poster offering a $500.00 reward for David L. Wall, alias "Spider". (RT 2578, 2581.)

On June 9, 1979, San Diego police officers questioned petitioner in Oklahoma after reading him his Miranda rights.

petitioner said he got the van from Fran, a white woman who had left her husband for "Spider", and that he knew "Spider" for six years.[3] Fran and Spider were in Shreveport. They gave him the van and her charge cards to use for food and gasoline. (CT 2846-2848, 2854, 2862.)

Petitioner said he saw no blood in the van and the blood on his shoe was his own. (RT 2945-2946, 2904.) A criminalist testified at trial that the blood on petitioner's shoe was type O, like Eleanor Buchanan's. (RT 2127.) Petitioner was type A. (RT 3112, 3110, 3114.) The criminalist further testified the blood could not have come from the van's carpeting, but went on wet. It had no blue fibers in it. (RT 2127, 4017-4018.)

The police showed petitioner a photograph of Eleanor Buchanan during questioning and asked if that were Fran. He said it looked like her but Fran was a little skinnier. Asked what Fran was wearing when she and Spider picked him up to leave San Diego, petitioner said the only time he saw her, she wore light jeans and a beige non-leather purse. (RT 2873-2875.)

En route to San Diego petitioner was disturbed about the arrest for murder and kept saying it was not going to stick because all the police had was a body they could not identify and a run-away wife. (RT 2950.)

Shortly after petitioner's return to San Diego, Terry Buchanan received a letter with petitioner's return address in county jail. It said, "You are probably full of grief when you should be highly pissed-off . . ." because Fran was not dead but had left with Spider and was smoking Sherman sticks. Buchanan turned the letter over to the District Attorney's Office. (RT 2140-2145.)

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3. Neither petitioner's parents (RT 2048, 2078), nor friends (RT 2489-2734) ever heard of "Spider". "Fran" was Eleanor Buchanan's nickname. It was written on the school papers she was carrying on the night she disappeared and also in an unmailed birth announcement she had in her purse. (RT 2116-2117.)

Petitioner hinted to a local girlfriend in letters and during a jail visit that she should call Terry Buchanan and the press, posing as Eleanor Buchanan, and tell them she was alive. (RT 3618-3621.)

On January 24, 1980, petitioner was talking about his case to another prisoner. The prisoner said, "Who are you trying to convince, Hamilton, me or yourself?" Hamilton replied, "Well, I did it, but they'll never prove it." (RT 3023, 3030.) The prisoner reported the conversation to a guard. (RT 3032.)

While transporting petitioner between the jail and courtroom for trial, a deputy sheriff was tightening petitioner's security chains. Petitioner said, "You go ahead and have your fun, I'll have mine later." The guard responded, "I thought you already had your fun?" Petitioner replied, "Yeah, and I'll kill you and a lot more, too, and you may be first on my list." (RT 3327-3329.)

Defense

Petitioner testified that he saw the Buchanans' van parked on the street with Eleanor's purse on the passenger seat just after midnight on May 31, 1979, and took it. (RT 3608, 3439.) He never saw the victim dead or alive. (RT 3438.)[4/] Petitioner believed she was killed by Harry Piper, who dumped the body then pretended to find it. (RT 2428.)

Rebuttal

Harry Piper had two crushed vertebrae and could not lift anything at the time he found the body. (RT 3981.) Furthermore, his car was parked over the drag mark, so the body was there when he drove up. (Trial Exh. T and RT 3718, 3879.)

Penalty Phase

Petitioner had five prior felony convictions for forgery, burglary, and auto theft. (RT 4478-4479.)

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4. However, he told police officers during questioning that the victim wore light colored jeans when she left with Spider (RT 2875) and she was in fact wearing tan levis when she left for school the night she disappeared. (RT 2100-210].)

On November 7, 1976, he robbed and beat Ruth Story, an elderly woman who was walking down a Linda Vista Street with a cane. (RT 4448-4452, 4552.) She was hospitalized and had reconstructive plastic surgery on her face. Five years later, she was still in pain and unable to chew even hamburger. (RT 4455, 4471-4472.) In a letter to the victim dated November 17, 1978, petitioner stated he did not know her personally. (RT 4527-4528, 4530.) Eleven days later, the district attorney received a letter from petitioner claiming the victim used to pay him for sexual services from 1967-1969, when he was a minor. (RT 4541.)

In February, 1979, after spending the night in a motel with Rosie Blackman, whom petitioner had seen frequently for three months, he punched and kicked her all over her body. She made no attempt to strike back. (RT 4429, 4434-4437.) A few weeks later, he came up to her at work as she was cleaning her taxi cab and repeatedly kicked her head and body. Her supervisor called the police. (RT 4435-4436.)

While in custody on October 8, 1980, petitioner refused to go to court and assumed a fighting stance when deputies entered his cell. He had to be physically carried down the corridor. He yelled obscenities, threatened to fight the deputies and spit in the face of one of the officers. (RT 4400-4422.)

Penalty Defense

Petitioner is 29 years old and essentially had a good home life as the sixth of eight children. His father is a Baptist minister. (RT 4587.) He has eight and nine year old sons who live in Los Angeles with his ex-wife. (RT 4606-4608.) Relatives and family friends asked the jury to spare his life. (See also, People v. Hamilton, supra, 45 Cal.3d at 357-362, guilt phase facts; 364-366, penalty phase facts.)

SUMMARY OF RESPONDENT'S ARGUMENT

Any error in reconsidering petitioner's affirmed guilt phase after the judgment was vacated by this Court could only have benefited him. This would be the wrong case to further define state courts' ability to reconsider issues on remand, because the reconsideration resulted in no change.

The death penalty is defined in California in a two-phase unitary trial. Thus, petitioner's motion for self-representation made five days before starting the penalty phase was in essence a request to change attorneys mid-trial and was addressed to the discretion of the trial court. Denial of the motion was not error, in view of the outstanding performance of attorneys representing petitioner, the fact his complaints about them were without merit and there was fear of obstructionist and disruptive conduct due to petitioner's violent confrontations with court personnel in the jail.

Instructing the jury it "shall" impose the death penalty if aggravating circumstances outweighed mitigating circumstances and "shall" impose life without possibility of parole if mitigating circumstances outweighed aggravating circumstances, did not prevent the jury from considering any relevant mitigation.

For those reasons, the petition should be denied.

ARGUMENT

I

UPON RECEIPT OF THE VACATED JUDGMENT, THE CALIFORNIA SUPREME COURT PROPERLY RECONSIDERED THE ENTIRE CASE; IN ANY EVENT, PETITIONER SUFFERED NO PREJUDICE SINCE ALL GUILT PHASE ISSUES HAD BEEN RESOLVED AGAINST HIM, AND RECONSIDERATION COULD NOT HAVE LEFT HIM IN A WORSE POSITION

Petitioner contends this Court "should not permit a state court to re-open issues otherwise foreclosed to it in violation of this Court's remand order." (Pet., p. 9.) The California Supreme Court felt free to reconsider the guilt phase issues because this Court's order "vacated" the judgment. In view of the fact that all guilt phase issues had been affirmed as to petitioner, reconsideration could not have enhanced the state's position. Thus, petitioner got another bite at the apple and should not be heard further.

The California Supreme Court initially affirmed petitioner's convictions, but reversed the jury's special circumstance findings, which had rendered him death eligible, because the jury had not been instructed to find petitioner intended to kill. (People v. Hamilton (1985) 41 Cal.3d 408, citing Carlos v. Superior Court (1983) 35 Cal.3d 131.) On July 7, 1986, this Court ordered "the judgment is vacated and the case is remanded to the Supreme Court of California for further consideration in light of Ross v. Clark, 478 U.S. ___ (1986)." (California v. Hamilton (1986) 478 U.S. 1017.)

On May 19, 1988, the California Supreme Court issued the instant opinion. (People v. Hamilton (1988) 45 Cal.3d 351 (Hamilton II).) Contrary to the assumption of the parties', the California Supreme Court concluded "the cause in its entirety is properly before us. This is so because the United States Supreme Court vacated the judgment in Hamilton I and rendered the decision a nullity." (Id., at p. 363.)[5/]

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5. To the extent petitioner complains "Hamilton II was based upon a case decided by that court after this Court's remand order" (Ptn., p. 4), the California Supreme Court approached the harmless error issue remanded to it by deciding there was no error. We see no error.

When it grants certiorari, vacates a judgment and remands for further consideration, this Court does not make a final determination on the merits. (Henry v. City of Rockhill (1963) 376 U.S. 776, 777.) Such action means that this Court is "not certain that the case was free from all obstacles to reversal on an intervening precedent . . ." (Id., at p. 776.)6/ Should the court wish to give further definition to the term "vacated" judgments, this would not be the proper case.

Here, as in Elfbrandt v. Russell (1965) 384 U.S. 11, 12, the State Supreme Court on reconsideration reinstated the original judgment. It had both the right and power to do that under this Court's order. Furthermore, in view of the fact that the guilt phase had been completely affirmed by Hamilton I, petitioner could suffer no prejudice by the reconsideration. Should the court wish to give further definition to the effect of "vacated" judgments, this would not be the proper case.

The reconsideration resulted in no change. Any error in considering the guilt phase again was potentially beneficial to petitioner. Consequently, no right of his was infringed in that he got a free second review of his convictions.

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6. Lower court cases have held that the word "vacate" as applied to a judgment means to annul, set aside or render void. (Ohio Fuel Gas Co. v. City of Mt. Vernon (1930) 37 Ohio App. 159, 166, 174 N.E. 260, 262; Black's Law Dictionary, 4th Ed., p. 1717, citing Stewart v. O'Neal (1917) 237 F. 897, 903; see also, Board of Supervisors of Louisiana State University v. Tureaud (5th Cir. 1955) 226 F.2d 714, 717.)

II

IN A UNITARY TRIAL, PETITIONER'S CONDITIONAL REQUEST TO REPRESENT HIMSELF AT THE PENALTY PHASE WAS DENIED WITHOUT ABUSE OF DISCRETION AS WAS HIS LATER UNEQUIVOCAL REQUEST

Petitioner contends he filed a motion to represent himself in the penalty phase on the day the jury found him guilty of first-degree murder and special circumstances. That being the moment the need for penalty proceedings first becomes apparent, he argues the motion was timely and should have been granted as a matter of right. (Ptn., pp. 10-15.) Under state law, the death penalty trial is a unitary one with two phases, so that a motion at the close of the guilt phase is addressed to the discretion of the trial court. Furthermore, petitioner's request was conditional. The unequivocal request for self-representation on January 15, 1981, came after a history of equivocal, conditional requests, obstreperous behavior and violent attacks on people involved in the court process. Both requests were denied without abuse of discretion.

Guilty verdicts were filed on January 6, 1981. (CT 1204-1210.) On the same day, petitioner moved the trial court to relieve counsel or alternatively to allow him to represent himself because counsel had refused to include in final argument petitioner's belief that the perpetrator of the crime planned it and entered the vehicle with specific intent to kidnap or kill the victim, had knowledge of her activities and a personal grudge against her. The motion was summarily denied. (CT 1202-1203.)

On January 15, 1981, a hearing was held on petitioner's petition for writ of habeas corpus. Petitioner had subpoenaed 12 people for the hearing but had used the case number of the robbery case which was trailing the death penalty trial. Consequently, when the witnesses contacted defense counsel, they were told the robbery would not be heard that day. (66RT 4318, 4285-4286.) As it turned out, petitioner merely wanted to interview these people to see if they had done certain things he had requested. Specifically, he had heard there was a confession to the murder by a Mesa College student. (66RT 4291-4292.)

Counsel said the matter had been investigated thoroughly. (66RT 4319-4320.) During these discussions, petitioner did say unequivocally that he did not want to be represented by counsel. (66RT 4316.) This motion, five days before the penalty phase opened, was denied. (Hamilton II, supra, 45 Cal.3d at p. 367.)

Faretta v. California (1975) 422 U.S. 806, established a defendant's Federal constitutional right to represent himself without counsel upon voluntary and intelligent election. In order to invoke the constitutionally mandated right of self-representation, a defendant in a criminal trial should make an unequivocal assertion of that right within a reasonable time before commencement of trial. (People v. Windham (1977) 19 Cal.3d 121, 128.) However, once a defendant has chosen to proceed to trial represented by counsel, his demands to discharge the attorney and proceed pro se are addressed to the sound discretion of the court. Among the factors a trial court should consider when exercising that discretion are the quality of counsel's representation of the defendant, defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings and the disruption or delay which might reasonably be expected to flow from the granting of such a motion. (Id., at pp. 128-129.)

Here, petitioner's January 15, 1981, request to represent himself was five days before the opening of the penalty phase, the second stage of a unitary capital trial. Thus, the motion was addressed to the discretion of the trial court. (See, People v. Moore (Filed Nov. 3, 1988 in CR 23721) ___ Cal.3d ___, upholding a finding of untimeliness regarding a motion made three days before the penalty trial began. [Slip. opn., pp. 14-20].)

The denial was not an abuse of discretion. The trial judge observed that the defense team had done an outstanding job in representation of the defendant, petitioner's complaints were "totally and completely without merit" (66RT 4320), and petitioner had had violent confrontations with deputies in the

jail as well as violent confrontations with other persons. (66RT 4320-4322; Hamilton II, supra, 45 Cal.3d at pp. 367-368.)

The trial court's denial of the motion in question was neither erroneous nor an abuse of discretion. The California Supreme Court ruled the right of self-representation applies to the guilt phase of death penalty cases. (People v. Terone (1979) 23 Cal.3d 103, 113.) However, petitioner failed to make a motion to represent himself pre-trial. His motion came five days before the second phase of a unitary trial was to begin. As such, the right of self representation was no longer a matter of right, but a matter of court discretion.

Petitioner argues the penalty phase is "itself a trial on the issue of punishment . . . ," citing Bullington v. Missouri (1981) 451 U.S. 430, 437, and a dissenting opinion applying Bullington to the right of counsel and self-representation, Petition, pages 12-13.

The timeliness of a motion for self-representation in the penalty phase is properly left to state law. The California Supreme Court recently refused to equate the separate phases of trial to separate "proceedings," so as to require a witness to invoke the Fifth Amendment privilege at each. (People v. Malone (filed Nov. 3, 1988 in CR 23115) ___ Cal.3d ___, slip opn., p. 45.)

Even if this Court wished to speak to the issue of a unitary two phase capital trial, this is not the proper case in view of the petitioner's proclivity toward changing attorneys, by his attempts to use motions for self-representation as tactical maneuvers to get his way and his penchant for violence outside the courtroom towards people involved in the court process.

Due to incompatibility, Patrick O'Connor was relieved as petitioner's attorney on September 25, 1979, (CT 305-308), Jerry Wallingford was relieved two months later (CT 369), and five months after that petitioner moved to relieve Thomas Ryan and Vivian Camberg, his third and fourth attorneys. (17RT 5.)

Upon denial of his motion, petitioner said, "I request to represent myself then. I might as well." (17RT 30.) Petitioner was told the matter was not before the court, but he could "make that motion properly if he would desire to do so." (RT 30-31.) (See Hamilton II, supra, 45 Cal.3d at p. 366.)

On May 1, 1980, petitioner filed a motion to relieve counsel and represent himself. (CT 667.6, 70.) Apparently, he withdrew that motion before the court had an opportunity to rule on it when he was granted the status of co-counsel with the understanding that Thomas Ryan would be the lead attorney and decide tactics. (Representations of counsel at 19RT 28-29; Hamilton II, supra, 45 Cal.3d at p. 366.)

Petitioner had disagreements with counsel and often requested their replacement. At times the requests were conditional or were withdrawn without ruling. (See Hamilton I, 41 Cal.3d 408, 420-421.)

Furthermore, petitioner had a proclivity for long narrative complaints about factual disputes that refuted his version of the facts (see 72RT 58-63), and was willing to boldly state his questions were not being answered when a three-person defense team was in constant contact with him. (72RT 70-71; 19RT 446.) He had attacked people involved in the court process at the jail and threatened to disrupt the court proceedings by attacking his attorneys or even the judge. (72RT 32.)

The right of self-representation can be denied if the there is reason to fear obstructionist or unruly conduct. (Davis v. Morris (9th Cir. 1981) 657 F.2d 1104, 1106, citing other authorities.) The Faretta decision states that serious and disruptive conduct is ground for terminating self-representation. (Faretta v. California, supra, 422 U.S. 806, 834.)

In these circumstances, the court did not abuse its discretion by denying petitioner's motion for self-representation at the penalty phase. This was in essence a motion to change attorneys because under California law capital cases consist of a

unitary trial. (See, People v. Hamilton II, supra, 45 Cal.3d at p. 369; People v. Malone, supra, slip opn., at p. 45.) Furthermore, petitioner had changed counsel twice and had made requests for self-representation as a tactic to get other things he wanted. He was also violent outside the courtroom and had threatened to attack court personnel or the judge, which presented a potential for disruptive conduct in court. In these circumstances, the trial court properly denied the motion. Furthermore, for the reasons stated, this would not be the proper case for this Court to decide the timeliness of self-representation requests in unitary trials.

III

THE INSTRUCTIONS GIVEN PROVIDED GUIDED DISCRETION IN SETTING THE PENALTY WITHOUT PREVENTING THE JURY FROM CONSIDERING ANY MITIGATING EVIDENCE IN THE CASE

Petitioner objects to the language in CALJIC No. 8.84.2 stating the jury "shall" impose the death penalty if it finds the aggravating factors outweigh the mitigating factors. Petitioner's jury was instructed not only that it could consider the statutory factors in aggravation but that it could consider anything in mitigation. Thus, it was not possible for the jury to conclude the aggravating circumstances technically outweighed the mitigating yet it must return a death verdict even if it believed the lesser sentence was appropriate.

First, we observe the instruction told the jury to weigh, not add, circumstances and to impose death "[i]f you conclude that the aggravating circumstances outweigh the mitigating circumstances . . ." (RT 4669, emphasis added.) The jury was left free to judge the quality of each factor and to assign it whatever weight it felt appropriate. This Court has held a death penalty based on affirmative answers to two questions (deliberate acts and future dangerousness) by the jury does not violate the Eighth Amendment, because it does not prevent the jury from considering any relevant mitigating evidence in the case in view of an instruction that the jury arrive at its verdict based on all the evidence. (Franklin v. Lynaugh (1988) 487 U.S. ___, [101 L.Ed.2d 155, 159-160].) Pursuant to California Penal Code section 190.3, petitioner's jury was expressly invited to consider other extenuating circumstances.

The California Supreme Court, after reviewing the record of the penalty phase in its entirety, concluded for three reasons that the jurors were not misled by the language challenged by petitioner. First, although the prosecutor referred briefly to the instruction's mandatory sentencing language in closing argument, he clearly acknowledged the jurors were to make the decision. Second, the prosecutor emphasized the

jurors alone were to determine whether the death penalty was appropriate. Third, the court instructed the jurors pursuant to Hamilton's request that "in weighing the aggravating and mitigating factors, you are not to merely count numbers on either side. You are instructed rather to weigh and consider the factors on each side as a whole;" and, "in order to impose a death sentence, you must be convinced beyond a reasonable doubt that the totality of the aggravating circumstances outweigh[s] the totality of the mitigating circumstances." (People v. Hamilton, supra, 45 Cal.3d at p. 371.)

The California Supreme Court acknowledged the phrase "shall impose a sentence of death" might "leave room for some confusion as to the jury's role," but has rejected the claim that the 1978 statute unconstitutionally authorized a mandatory death penalty. (People v. Brown (1985) 40 Cal.3d 512, 545; reversed on other grounds in California v. Brown (1987) 479 U.S. 538.) The California Supreme Court has further held that a death judgment is invalid under the Eighth Amendment if imposed by a sentencer that believed it lacked ultimate moral responsibility to determine what penalty is appropriate under all the circumstances of the case. (People v. Melton (1988) 44 Cal.3d 713, 761.) At the same time, jurors are not to receive such unbridled discretion that arbitrary decisions are likely. (Furman v. Georgia (1972) 408 U.S. 238.)

Here, the jury was told pursuant to CALJIC No. 8.84.1 (penalty trial -- factors for consideration)[7] To consider any

7. CALJIC No. 8.84.1, as given in the instant case, provided:

> "In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into account and be guided by the following factors, if applicable:
>
> "(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.
>
> "(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied

circumstances which extenuated the gravity of the crime even though it was not a legal excuse for the crime. (RT 4662-4664.) Consideration of compassion as a mitigating factor was, therefore, expressly allowed. A review of Lockett v. Ohio (1978) 438 U.S. 586, demonstrates why this instruction was constitutionally appropriate.

Lockett v. Ohio, supra, in a plurality opinion held that the Ohio death penalty statute was unconstitutional under the Eighth and Fourteenth Amendments of the United States Constitution because the statute required the death penalty where one or more factors in aggravation were proven unless outweighed by evidence in mitigation, which had to fit within one of three

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threat to use force or violence.

"(c) The presence or absence of any prior felony conviction.

"(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

"(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or expectation for his conduct.

"(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

"(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the affects of intoxication.

"(i) The age of the defendant at the time of the crime.

"(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

"(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (See, Cal. Pen. Code, § 190.3.)

Pursuant to CALJIC No. 8.84.2, the jury was also told it "shall" impose death if aggravating circumstances outweighed mitigating circumstances and "shall" impose life without possibility of parole if mitigating circumstances outweigh aggravating circumstances. (See, Cal. Pen. Code, § 190.3.)

specific categories. Lockett compared the Ohio statute with those upheld in Gregg v. Georgia (1976) 428 U.S. 153, and Proffitt v. Florida (1976) 428 U.S. 242, and found that the Ohio Statute, in contrast to those in Gregg and Proffitt, violated the Eighth and Fourteenth Amendments since it precluded the consideration as a mitigating factor of any relevant aspect of the defendant's character or record or any of the circumstances of the offense. (Lockett v. Ohio, supra, at pp. 604-607.)

In contrast to the instruction in Lockett v. Ohio, supra, the jury instruction in the instant case, CALJIC No. 8.84.1, meets the constitutional standards set forth in Lockett, supra. The Ohio statute in Lockett contained eight fewer categories and completely lacked the kind of catchall category contained in section (k). In its first sentence, CALJIC No. 8.84.1 instructs the jury that the mitigating factors are essentially unlimited since they can be derived from "all of the evidence which has been received during any part of the trial of this case. . . ." (Emphasis added.) In addition, the eleventh of the special categories given to the jury (section (k)) is a broad catchall category providing that the jury can consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (Emphasis added.) These factors necessarily include the offender and compassion.

Furthermore, California v. Ramos (1983) 463 U.S. 992, found no constitutional infirmity in California Penal Code section 190.3. Since the wording of that code section is identical to the wording of CALJIC No. 8.84.1(k), the instruction does not violate Lockett. The language of the instruction necessarily allows the jury to consider the offender and compassion since the jury sets the penalty after considering mitigating factors drawn from all evidence and "any other circumstance" extenuating the gravity of the crime.

Thus, unlike the situation in Lockett, in California the jury can consider any of the evidence presented at any phase

of the trial and any extenuating circumstance as factors in mitigation. Certainly, compassion and the individual worth of the defendant fall within this catchall category of section (k). The instruction allowed the jury to treat petitioner as an individual. (See, Lockett v. Ohio, supra, 438 U.S. at p. 605.) It did not prevent the jury from considering any relevant, mitigating evidence in the case. (See, Franklin v. Lynaugh, supra, 101 L.Ed.2d at p. 160.) Thus, there was no risk the death penalty would be imposed in spite of the hypothetical existence of factors allegedly calling for a less severe penalty.

Petitioner objects to use of the word "shall" in CALJIC No. 8.84.2, claiming that word somehow creates a duty to return a verdict of death. However, "shall" is also used in the portion of the instruction dealing with life confinement. (RT 4703.) Use of "shall" equally to describe both options could not possibly be misconstrued by a reasonable juror to mean one option should be chosen over the other. Moreover, use of "shall" merely mirrors the language of Penal Code section 190.3, which states the trier of fact shall take into account various relevant factors. Petitioner's contention such language may create a situation where the jury is obligated to impose the death penalty when it finds the aggravating circumstances outweigh the mitigating circumstances, even though it does not believe the aggravation is sufficient to justify death, makes no sense. Initially, it would be factually impossible for a jury to conclude the aggravating circumstances outweighed the mitigating circumstances and yet subjectively feel the death penalty was not warranted. Under CALJIC No. 8.84.1(k) the jury could consider any fact it wished to mitigate the crime and not impose the judgment of death. Given this fact, it is absurd to suggest that in spite of subsection (k), the jury would find the aggravating circumstances outweighed the mitigating circumstances and then still decide the death penalty was inappropriate.

Moreover, any modification to the instruction here would probably violate the federal constitution. The whole point

of this Court's decisions in Gregg, Proffitt, and Jurek (Gregg v. Georgia, supra, 428 U.S. 153; Proffitt v. Florida, supra, 428 U.S. 242; Jurek v. Texas (1976) 428 U.S. 262), is that the decision to impose death must be guided in a specific way and cannot be arbitrary and capricious. (See, Barclay v. Florida (1983) 463 U.S. 939.) However, petitioner's suggestion that the jury be allowed free reign to decide what penalty is appropriate after it finds the aggravating circumstances outweigh the mitigating circumstances would result in arbitrary and capricious decision making. This is improper.

Consequently, it is perfectly proper to give the jury consideration of a broad scope of evidence, give it various categories of aggravating and mitigating circumstances, and then advise it that if it finds the aggravating circumstances outweigh the mitigating circumstances it shall impose the death penalty. (Id.)

> ". . . [D]iscretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976) . . . ." (Kant v. Stephens (1983) 462 U.S. 862, 874.)
>
> The language in CALJIC No. 8.84.2,
>
> ". . . was directly taken from the 1978 death penalty law and accurately describes the jury's function under that law: to weigh the applicable aggravating and mitigating factors and, on that basis, and that basis alone, to determine whether death is an appropriate remedy." (People v. Hendricks (1988) 44 Cal.3d 635, 654, emphasis in original.)

Thus, the court conceded that in People v. Myers (1987) 43 Cal.3d 250, it was perhaps unduly critical of the prosecutor's reliance upon the mandatory language of these standard instructions. (People v. Hendricks, supra.) Where the record demonstrates that the jury fully understood that it could assign whatever weight it thought appropriate to the factors in aggravation and mitigation

and that it should base its penalty determination on all of the evidence in the case, use of the word "shall" in the instructions and argument does not compel a finding that the jury was misled "from an otherwise assumed proper understanding of its duty to determine appropriateness of death through the weighing process." (Id., at p. 655.)

Thus, petitioner's contention in this regard is meritless. (See, People v. Harris (1981) 28 Cal.3d 935, 963-964.)

In sum, the penalty phase instructions invite consideration of compassion, are equally weighted in sentencing alternatives, adequately define terms, and provide guidelines which promote sentencing reliability.

CONCLUSION

Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No: 88-5746
October Term, 1988

BERNARD LEE HAMILTON

Petitioner,

v.

THE STATE OF CALIFORNIA

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within BRIEF OF RESPONDENT IN OPPOSITION as follows: To Joseph F. Spaniol, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and nine (9) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

Barry L. Morris
Attorney at Law
580 Grand Ave.
Oakland, CA 94610

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 1 day of November, 1988.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, November, 9, 1988.

Anne Marie Buford
ANNE MARIE BUFORD

Subscribed and sworn to before me
this 9th day of November, 1988.

BETTY A. HITCHINGHAM
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Sept. 17, 1991

Betty A. Hitchingham
Notary Public in and for said County and State

APPENDIX 1-A

…gment by reducing the …ssibility of parole and …ie v. *Frierson* (1979) 25 … 587] (plur. opn.); see

[Crim. No. 21958. May 19, 1988.]

THE PEOPLE, Plaintiff and Respondent, v.
BERNARD LEE HAMILTON, Defendant and Appellant.

[Crim. Nos. 25303, 8201870. May 19, 1988.]

In re BERNARD LEE HAMILTON on Habeas Corpus.

SUMMARY

Defendant was convicted of first degree murder (Pen. Code, § 187), kidnapping (Pen. Code, § 207), robbery (Pen. Code, § 211), and burglary (Pen. Code, § 459). He was found to have committed the murder in the course of robbery (Pen. Code, § 190.2, subd. (a)(17)(i)), kidnapping (§ 190.2, subd. (a)(17)(ii)), and burglary (§ 190, subd. (a)(17)(vii)). He was sentenced to death. (Superior Court of San Diego County, No. 47283, Franklin B. Orfield, Judge.)

On remand from the United States Supreme Court, following its vacation of the previous judgment which had reversed the death penalty for failure of the trial court to instruct that intent to kill was an element of the felony-murder special circumstances, the Supreme Court affirmed the judgment in its entirety, and denied two petitions for habeas corpus. The court held the cause in its entirety was properly before it, and adopted its prior decision dealing with guilt issues as its decision in the proceeding. It further held the trial court did not err in failing to instruct the jury that intent to kill was an element of the felony-murder special circumstances, and thus did not reach the issue, the subject of the United States Supreme Court's remand order, of whether a failure to instruct on intent was subject to harmless-error analysis. The court held that the trial court did not abuse its discretion in denying defendant's motion to represent himself which was made in the midst of the jury's guilt phase deliberations. It also held that under the circumstances of the case and in view of the whole record defendant was not prejudiced by potentially misleading instructions pertaining to the jury's sentencing responsibility and discretion. The court held that although the trial court erred in giving a so-called Briggs instruction relating to the Governor's commutation and pardon power, the error was not prejudicial in view of the

trial court's subsequent instructions and admonitions not to make any use of the instruction in determining the penalty to be imposed on defendant. On the habeas corpus petitions, the court held defendant failed to show he was denied effective representation of counsel, and also rejected his claim the prosecution interfered with his attempt to obtain evidence. (Opinion by Mosk, J., with Lucas, C. J., Panelli, Arguelles, Eagleson, and Kaufman, JJ. concurring. Separate concurring and dissenting opinion by Broussard, J.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Courts § 33—Decisions and Orders—Law of the Case—Supreme Court Vacation of Judgment Remand.**—Where, in a death penalty case, the United States Supreme Court granted the California Attorney General's petition for certiorari on a particular issue, vacated the judgment, and remanded to the California Supreme Court for further proceedings, the decision was rendered a nullity and as such had no binding force. The cause in its entirety was then before the California Supreme Court. Accordingly, the doctrine of law of the case did not bar reconsideration of any point decided in the first case. The doctrine may be applied only when and to the extent the prior decision had binding force.

(2) **Homicide § 79—Instructions—Nature and Elements of Offense—Intent to Kill—Special Circumstances—Felony Murder.**—In a capital murder prosecution, the trial court did not err in failing to instruct the jury that intent to kill was an element of the felony-murder special circumstance, where all the evidence showed that defendant either actually killed the victim or was not involved in the crime at all, and there was no evidence that he was an aider and abetter. An instruction on intent to kill is only required when there is evidence from which the jury could find that the defendant was an aider and abetter rather than the actual killer.

(3a, 3b) **Criminal Law § 87.3—Rights of Accused—Aid of Counsel—Self-representation—Timeliness of Motion—Capital Case.**—In a death penalty case, defendant's motion to represent himself, filed in the midst of the jury's guilt phase deliberations, was not timely for purposes of invoking the absolute right of self-representation. The penalty phase could not be considered a separate trial for purposes of the motion. The penalty phase has no separate formal existence but is

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merely a stage in a unitary capital trial. Moreover, the connection between the phases of a capital trial is substantial and not merely formal.

(4) **Criminal Law § 87.2—Rights of Accused—Aid of Counsel—Self-representation—Denial of Motion—Discretion.**—The trial court in a capital case did not abuse its discretion in denying defendant's untimely motion to represent himself, where, although the court considered irrelevant factors such as defendant's inability "to roam around the courtroom" in shackles and his lack of competence in law, it nevertheless made a reasonable determination, after considering the proper factors, that defendant should not be permitted to represent himself at the penalty phase of the trial.

(5) **Homicide § 101—Punishment—Death Penalty—Sentencing Formula.**—The sentencing formula of Pen. Code, § 190.3, is not unconstitutional on the asserted ground that it withdraws from the trier of fact constitutionally compelled discretion and thereby undermines the reliability of the verdict.

(6) **Criminal Law § 823—Punishment—Penalty Trial—Instructions—Mandatory Sentencing Language.**—In the penalty phase of a capital case, an instruction incorporating the mandatory sentencing language of Pen. Code, § 190.3, did not mislead the jurors to defendant's prejudice as to the scope of their sentencing responsibility and discretion in violation of constitutional principles. Although in closing argument the prosecutor referred briefly to the mandatory sentencing language, he clearly acknowledged the jurors' discretion and their individual responsibility. In his closing argument defense counsel emphasized it was the sole responsibility of the jurors to determine whether the death penalty was appropriate for defendant. Also, at defendant's request the court instructed the jurors on their proper function in weighing aggravating and mitigating factors.

[See Cal.Jur.3d (Rev), Criminal Law, § 3345; Am.Jur.2d, Homicide, § 555.]

(7) **Criminal Law § 823—Punishment—Penalty Trial—Instructions—Mitigating Factors.**—In the penalty phase of a capital case, a potentially misleading instruction on what the jury could consider in mitigation did not mislead the jury to defendant's prejudice. The jurors were in fact adequately informed that they could consider character and background evidence. After the defense presented a case that consisted entirely of such evidence, the court instructed the jurors that they

should not limit their consideration of mitigating circumstances to the specific statutory factors, but should consider any other circumstances presented as reasons for not imposing the death sentence.

(8) **Criminal Law § 823—Punishment—Penalty Trial—Instructions—Re Governor's Power to Commute or Modify.**—In the penalty phase of a capital case, the trial court erred in instructing the jury as to the Governor's commutation and pardon powers as to life sentences (Briggs instruction), and the error was not cured by a supplementary instruction that did not alter the objectionable language which continued to mislead and to invite speculation on irrelevant and improper matters. However, the error was not prejudicial, in view of the court's direction to the jurors not to make any use of the erroneous instruction in determining the penalty to be imposed on defendant. Jurors are presumed to follow the instructions given by the court. A brief and isolated comment by the prosecutor that defendant would spend his time in prison devising ways to manipulate the system and get out could not be understood to refer to the erroneous instruction: The remark did not even allude to the commutation power.

(9) **Criminal Law § 821—Punishment—Penalty Trial—Evidence—Invalid Special Circumstance.**—Even if one of three felony-murder special circumstances was invalid and improperly presented to the jury as evidence in aggravation in a capital case, no reversible error occurred, in view of the overwhelming evidence in aggravation and the minimal evidence in mitigation.

(10) **Homicide § 97—Verdict, Sentence, and Punishment—Capital Case—Power to Strike Special Circumstance Findings.**—Pen. Code, § 1385, authorizes the trial court to dismiss "in furtherance of justice" in any circumstance in which the legislative body has not clearly manifested a contrary intent. Thus, under the 1978 death penalty law, the trial court in a capital case had the authority to strike the special circumstance findings pursuant to § 1385.

(11) **Homicide § 101—Punishment—Death Penalty—Validity.**—Where, in view of the theories presented and the evidence introduced, the jury's guilt phase verdicts in a capital trial implied a finding that defendant was the actual killer, and where that finding was amply supported by the evidence, the imposition of the penalty of death on defendant did not violate U.S. Const., 8th Amend.

(12) **Criminal Law § 104—Rights of Accused—Competence of Defense Counsel—Burden of Proof.**—In order to establish a claim of

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ineffective assistance of counsel, a defendant must show that counsel performed at a level below an objective standard of reasonableness under prevailing professional norms; and thereby subjected the defense to prejudice, that is, in the absence of counsel's failings a more favorable outcome was reasonably probable.

(13) **Criminal Law § 104—Rights of Accused—Competence of Defense Counsel—Burden of Proof—Allegations.**—On appeal from a capital conviction, allegations by defendant that trial counsel made various errors in strategy and tactics and that they feared defendant and treated him with distrust, and that appellate counsel refused to argue that facial expressions and gestures trial counsel assertedly made during jury selection prejudiced the defense, failed to effectively allege either deficient performance or prejudice.

(14) **Criminal Law § 233—Trial—Power and Conduct of Judge—Bias.**—When the state of mind of the trial judge in a criminal trial appears to be adverse to one of the parties but is based on actual observance of the witnesses and evidence given during the trial of the action, it does not amount to prejudice.

(15) **Criminal Law § 48—Rights of Accused—Fair Trial—Presence at Trial—Scheduling Hearing.**—A defendant charged with capital crimes was not entitled to be present at a pretrial hearing to establish a schedule under which a defense criminologist would examine a vehicle involved in the murder. An accused is not entitled to be personally present on matters in which his presence does not bear a reasonably substantial relation to the fullness of his opportunity to defend against the charge. Defendant's attendance at what was essentially a scheduling hearing would not have been useful or of benefit to the defense.

(16) **Criminal Law § 45—Rights of Accused—Fair Trial—Distortion or Suppression of Evidence.**—A capital defendant's claim on habeas corpus that the prosecution interfered with his attempt to obtain evidence by having a van involved in the murder examined and cleaned before the defense criminologist could subject it to inspection and tests failed to adequately allege interference, where it did not state that the criminologist acted without undue delay or that the delay on his part was attributable to the prosecution.

COUNSEL.

Barry L. Morris, under appointment by the Supreme Court, for Defendant, Appellant and Petitioner.

John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, Harley D. Mayfield, Assistant Attorney General, Jay M. Bloom, John W. Carney, Michael D. Wellington and Pat Zaharopoulos, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

MOSK, J.—The cause in Crim. 21958 is before us on remand from the United States Supreme Court. It was last here on automatic appeal from a judgment of death. (Pen. Code, § 1239, subd. (b).) Defendant was convicted of first degree murder (*id.*, § 187), kidnapping (*id.*, § 207), robbery (*id.*, § 211), and burglary (*id.*, § 459). He was found to have committed the murder in the course of robbery (*id.*, § 190.2, subd. (a)(17)(i)), kidnapping (*id.*, subd. (a)(17)(ii)), and burglary (*id.*, subd. (a)(17)(vii)). He admitted that he had previously suffered convictions for forgery (*id.*, § 470) and for two counts of burglary (*id.*, § 459). He was sentenced to death.

When the cause was previously before us we held there was no reversible error at the guilt phase of the trial, but that under the general rule of automatic reversal of *People* v. *Garcia* (1984) 36 Cal.3d 539 [205 Cal.Rptr. 265, 684 P.2d 826], the court's failure to instruct in accordance with *Carlos* v. *Superior Court* (1983) 35 Cal.3d 131 [197 Cal.Rptr. 79, 672 P.2d 862], that intent to kill was an element of the felony-murder special circumstances, required the setting aside of the special circumstance findings and hence the reversal of the judgment of death. (*People* v. *Hamilton* (1985) 41 Cal.3d 408 [221 Cal.Rptr. 902, 710 P.2d 981] [*Hamilton I*].)

After seeking rehearing in this court without success, the Attorney General petitioned the United States Supreme Court for a writ of certiorari. The court granted the petition, ordered our judgment vacated, and remanded the cause for reconsideration in light of its decision in *Ross* v. *Clark* (1986) 478 U.S. 570 [92 L.Ed.2d 460, 106 S.Ct. 3101].

Subsequently, defendant in propria persona filed two petitions for writ of habeas corpus. (Crim. 25303 and S001870.) We consolidate the cause in Crim. 21958 and the proceedings in Crim. 25303 and S001870 for purposes of decision.

As we shall explain, we conclude, as we concluded in *Hamilton I*, that the judgment must be affirmed as to guilt. Contrary to our determination in *Hamilton I*, we now conclude that the special circumstance findings must be upheld: under *People* v. *Anderson* (1987) 43 Cal.3d 1104, 1147 [240

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Cal.Rptr. 585, 742 P.2d 1306], the court was not obligated to instruct on intent to kill with regard to the special circumstances here; and defendant does not present any other ground for setting aside the findings. We also conclude that the judgment must be affirmed as to penalty. Finally, we conclude that the petitions for writ of habeas corpus must be denied.

I. DIRECT APPEAL (CRIM. 21958)

A. *The Facts*

The facts of this case, which appear in *Hamilton I* at pages 413 to 419 of 41 Cal.3d, are relevant to our decision and are accordingly quoted in extenso below.

The evidence presented in the prosecution's case-in-chief tells the following tale. "On May 31, 1979, about 1 P.M., the body of Eleanore Frances Buchanan was discovered in the grass near a cul-de-sac off Pine Valley Road, near San Diego. Harry Piper noticed it while walking back to his car from target shooting. The body had no head or hands and was clothed only in a bra, underpants and socks.

"The body appeared to be in full rigor mortis when a deputy sheriff arrived at the scene between 1:30 and 2 p.m. Two strings of white cord were tied around the ankles, and there were dark blue fibers sticking to some blood on the body. There were marks on the wrists indicating that they had been tied together. A search of the area revealed no clothing or anything else that could be associated with the victim.

"Dr. Luibel, who performed the autopsy, was unable to determine the cause of death because of the absence of the head. (The head and hands have never been found.) He could, however, rule out natural causes. There were three long superficial incisions on the abdomen that appeared to have been inflicted after death. There was a horizontal stab wound on the abdomen that had probably been inflicted before death, but it did not penetrate the stomach or intestines. The right hand appeared to have been sawed off and the left one cut off with a knife. The head was probably removed by using both a knife and saw. Dr. Luibel could not say whether the victim was alive or dead when her head was cut off. The small amount of hemorrhage at the wrists suggested the victim was probably dead when her hands were cut off. The body was still in full rigor mortis at 4 p.m. on May 31, 1979, when Dr. Luibel examined it. Death would have occurred about 16 hours before then—about midnight the night before.

"Terry Buchanan, the victim's husband, testified that his wife had given birth to a baby boy three weeks before her death and that she was still

nursing him on May 30, 1979. That day Mrs. Buchanan left the house about 6:30 p.m. to go to a math class at Mesa College from 7 to 10 p.m. She was wearing tan levis, a beige and brown T-shirt, and was carrying a brown simulated leather purse. Mrs. Buchanan drove the family's only vehicle—a new blue van. There was very little gas in the tank because Buchanan planned to have the tank replaced the next day. Since Buchanan used the van during the day for his dental supply sales work, the van contained dental equipment and supplies. Buchanan said his wife was very security conscious and customarily locked the van. He also said that everything in the van was in good condition when she left.

"Mrs. Buchanan was last seen alive walking toward the parking lot from her math class about 9:30 p.m. Fellow students had given her copies of class notes for the classes she had missed because of the birth of her baby. Mrs. Buchanan had left class a little early because an optional quiz was given at 9:30 p.m.

"At 1:52 a.m. (California time) on May 31, 1979, defendant called his girlfriend, Donna Hatch, in Terrell, Texas from his parents' home in San Diego. He told Donna that he had a van and was planning to leave for Texas as soon as the gas stations opened in the morning.

"There was a gasoline shortage at the time, and gas stations were only open for limited hours. Between 4:45 a.m. and 10:15 a.m. on May 31, 1979, defendant used Terry and Eleanore Buchanan's Visa card to buy gas in El Cajon, California. The card was used two more times that day to buy gas for the van—once in El Centro, California at a station that was open between 6 a.m. and 10 a.m., and once in Tucson, Arizona.

"When defendant arrived at Donna Hatch's home in Terrell, Texas on the evening of June 1, 1979, the van was dirty, had a broken arm on the driver's chair, a broken mirror, and a broken wing window on the passenger side. Defendant took Donna with him on errands in the van on June 1, 2 and 3, 1979. Donna saw some credit cards in the name of Terry and Eleanore Buchanan in the compartment between the seats. Defendant used the credit cards to buy gas and food while Donna was with him.

"On June 3, while Donna was in the van with defendant and her daughter, they saw a highway patrolman. When Donna turned back to talk to her daughter, defendant told her not to make any sudden moves because they could get shot. Later, defendant stopped at a pay phone to call his brother and his friend Clifford. Donna heard defendant tell his brother he had flown to Texas. Clifford testified that when defendant called him, he was watching a report on TV that the body of a white woman with her head and hands

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"Donna broke up with defendant the next day. Defendant said that if Donna were upset about the fact that he had lied about his ex-wife being dead, he would kill his ex-wife. On June 6, defendant called Donna to discuss bringing her back to California to testify for him in a pending case. At one point, a friend of Donna's got on the phone. Defendant told Donna, 'I'm going to kill you and your friend, too. And you won't know when I'll be around because I don't have to be driving this van, I can be in another vehicle.' Donna never saw or talked to defendant after that phone call.

"Defendant continued using the Buchanans' credit cards to buy gas, food and other items. It was stipulated that on June 6 defendant charged a saw, screwdriver and set of wrenches at a local store, and on June 7, he bought a butcher knife and two skeins of twine at a variety store.

"While driving the van in Oklahoma on June 8, 1979, defendant was stopped by a deputy sheriff. The deputy ran a check of the van's VIN number and learned that it belonged to the homicide victim. Defendant was arrested and taken to jail. On the way to the jail he passed a poster offering a reward for David L. Wall, alias 'Spider.'

"On June 9, 1979, San Diego sheriff's deputies interviewed defendant in Oklahoma. They began by introducing themselves, saying that they had come to talk to defendant about the van. Defendant interrupted them, stating: 'Yeah, the guy told me yesterday, one that pulled the gun on me, that it had been involved in a homicide, and uh . . . .' Defendant was then advised of his *Miranda* rights, which he waived. Defendant told the deputies he had left San Diego in the van with Spider and Fran, a white woman who had left her husband for Spider. Spider's real name was Calvin Spencer. Fran and Spider were presently in Shreveport, Louisiana. They had given defendant the van and credit cards when he had said he did not want to stay in Louisiana. Defendant was shown a picture of Eleanore Buchanan with her baby. He said it looked like Fran, but Fran was a little skinnier.[1]

[1] At this point the opinion notes: "Fran was Eleanore Buchanan's nickname. It was on the release papers she had been carrying and on an enumerated birth announcement that had been in her purse." (41 Cal.3d at p. 416, fn. 2.)

Defendant said 'the only time I seen her' Fran was wearing light colored jeans and carrying a beige zoomother purse.

"Enroute to San Diego, defendant was disturbed about his arrest for murder and kept saying it was not going to stick because all the police had was a body they could not identify and a runaway wife."[2]

"Shortly after defendant's preliminary hearing, Terry Buchanan received a letter with defendant's county jail return address. It said, 'You are probably full of grief when you should be highly pissed-off . . .' because Fran was not dead but had left with Spider and was smoking Sherman Sticks. Buchanan turned the letter over to the district attorney's office.

"Steven Thomas, an inmate at the San Diego County jail, testified that on January 24, 1980, he had a conversation with defendant about his case. He asked defendant, 'Who are you trying to convince, Hamilton, me or yourself?' Defendant replied, 'Well, I did it but they'll never prove it.' Thomas reported the conversation to the guard. Thomas had been convicted of murder, robbery, forgery, burglary and escape. Thomas testified he was in the federal witness protection program against organized crime, but had not received any money from the United States with respect to that program.

"While transporting defendant between the jail and courtroom on August 21, 1979, Deputy Sheriff Parsons was tightening defendant's security chains. Defendant said, 'All right, you have your fun, I'll have mine later.' Parsons responded, 'I thought you already had your fun.' Defendant replied, 'Yeah, and I'll kill a lot more, too, and you may be first on my list.'

"Brandon Armstrong, a criminalist, testified that the blue fibers that had been on the victim's body could easily have come from the carpet in the victim's van. Blood on the carpet in the van matched the type and characteristics of the victim. Several hairs found in the carpet stains could have been hers. Armstrong also examined blood found on defendant's shoe and concluded that it had been smeared on when wet. The blood on defendant's shoe was type O—the victim's type.[3] Defendant's type was A.

"A questioned documents expert testified that defendant was the person who had signed Terry Buchanan's name to the credit card invoices." (41 Cal.3d at pp. 413-417.)

[2] At this point the opinion notes: "The body was, in fact, quickly identified by a number of distinctive features, which included moles, toenail polish, scars, recent appendectomy, and the morning bra." (41 Cal.3d at p. 416, fn. 3.)

[3] At this point the opinion notes: "Armstrong testified on rebuttal that that blood on defendant's shoe could not have come from rubbing against the blood on the van's carpet." (41 Cal.3d at p. 417, fn. 4.)

The defense case was as follows. "Defendant's mother testified that he was at her house between 8 and 9 p.m. on May 30, 1979. She said that although she testified at the preliminary hearing that she did not remember seeing defendant on the evening of May 30, 1979, she later spoke to defendant who refreshed her recollection by reminding her of some things that had happened that evening.[5]

"Mary Brewer, a relative of defendant's who lived in Oklahoma City testified that defendant had visited her in the early part of June 1979. He gave her a ride in the van, and she did not remember seeing any blood in it.

"Defendant testified that he had never seen the victim alive or dead. He said he went to his sister-in-law's house after he left his parent's house about 9 p.m. on May 30, 1979. He saw the Buchanans' van parked on a street between 12:45 and 1 a.m. on May 31, 1979, while walking home from a 7-Eleven store after talking to Butch McIntyre.[6] The keys were in the ignition, the wing window was broken, and a purse was on the passenger seat. Defendant drove the van home, called Donna Hatch, put his clothes in it and left for Texas shortly before sunrise. Defendant said he broke the armrest on the driver's seat when he was moving from the passenger seat to the driver's seat. (The seats were swivel chairs with armrests.)

"Defendant explained that he had told the officers in Oklahoma that he had driven across the country with Spider and Fran because he did not want to get stuck with an auto theft charge.

"Defendant denied having threatened to kill Donna Hatch. He said he bought the saw and other items on June 6 before he spoke to Donna Hatch. He planned to use them to burglarize a store in Terrell. Defendant said he was attempting to distract Donna when he told her he thought he had killed someone; she was angry at him because she had just found out he had lied about his ex-wife being dead.

"David Faulkner, an entomologist, testified about an experiment he had conducted in an attempt to determine when the victim's body had been left at the cul-de-sac. Faulkner took a rabbit, with its head and forepaws severed, and at midnight put it where the victim had been found. The purpose was to determine the amount of insect activity that would occur. Faulkner

[5] At this point the opinion notes: "Defendant had written two letters to Donna Hatch after her preliminary hearing testimony attempting to refresh her recollection as to events that involved her." (41 Cal.3d at p. 417, fn. 5.)

[6] At this point the opinion notes: "McIntyre testified he saw defendant after watching the NBA game on TV. There had, however, been no game on May 30. There had been one on May 29, 1979." (41 Cal.3d at p. 418, fn. 6.)

testified that within a few hours of sunrise there were a lot of flies around the rabbit. Based on this experiment and his knowledge of the temperature on the morning of May 31, 1979, Faulkner concluded that the earliest the body would have been put there would have been 9 a.m. Faulkner admitted, however, that there is a great deal of variation in the degree to which insects are attracted to different human bodies.

"Parker Bell, a criminalist, testified that the blood on defendant's shoe was a smear, as opposed to a droplet or splatter. He thought the blood could have come from the carpet, but he acknowledged that there were no blue fibers in the blood. (The blue carpet shed badly.) On cross-examination, however, Bell admitted it was possible that the blood could have been smeared on defendant's shoe by having bumped one of the victim's bloody stumps.

"Dr. Ali Hameli, Chief Medical Examiner of the State of Delaware, testified that in his opinion the victim died between 9:30 and 12 p.m. on May 30. Dr. Hameli also thought that rigor mortis was present when the body was placed at the cul-de-sac and that the body could have been put there no earlier than 4 a.m. on May 31.

"Allen Biggs testified that he had been at the cul-de-sac about 10 a.m. on May 31, 1979. He had seen Mr. Piper's car but no body. Deputy Sheriff Crawford testified that tire tracks at the scene in the cul-de-sac did not match the tire tracks of the victim's van.[7]" (41 Cal.3d at pp. 417-419.)

B. *Hamilton I*

In *Hamilton I*, we considered the issues going to guilt raised by defendant and concluded that none required reversal. (41 Cal.3d at pp. 419-431.) We also concluded that in violation of our decision in *Carlos v. Superior Court*, *supra*, 35 Cal.3d 131, the court failed to instruct the jury that intent to kill was an element of the felony-murder special circumstances. (41 Cal.3d at p. 431.) Further, we concluded that this error fell within the scope of the rule of automatic reversal laid down in *People v. Garcia*, *supra*, 36 Cal.3d 539, and outside the four narrow exceptions enunciated in that opinion. Specifically, we determined that only the so-called *Cantrell-Thornton* exception was potentially available (*People v. Cantrell* (1973) 8 Cal.3d 672 [105 Cal.Rptr. 792, 504 P.2d 1256]; *People v. Thornton* (1974) 11 Cal.3d 738 [114 Cal.Rptr. 467, 523 P.2d 267])—viz., that intent to kill was established as a matter of law and there was no contrary evidence worthy of consider-

[7] At this point the opinion notes: "Crawford had testified for the prosecution and had identified photos that showed drag marks from the roadway to where the body had been found. The drag marks appeared to start on the pavement." (41 Cal.3d at p. 419, fn. 7.)

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ation. We thus determined that the evidence adduced at trial showed that the exception was in fact not available here. Accordingly, we vacated the special circumstance findings and reversed the judgment as to penalty.

Thereupon the Attorney General filed his petition for a writ of certiorari on the issue whether the failure to instruct on intent to kill with regard to a felony-murder special circumstance is subject to harmless-error analysis. The high court granted the petition, vacated the judgment in *Hamilton I*, and remanded the cause to this court for further consideration in light of its decision in *Ross v. Clark*, *supra*, 478 U.S. 570 [92 L.Ed.2d 460, 106 S.Ct. 3101].

C. *The Cause on Remand*

At the threshold, we must delineate the scope of review on remand.

(1) Contrary to the parties' assumption, the cause in its entirety is properly before us. This is so because the United States Supreme Court vacated the judgment in *Hamilton I* and rendered the decision a nullity. Also contrary to the parties' assumption, the doctrine of law of the case does not bar reconsideration of any point decided in *Hamilton I*. The doctrine may be applied only when and to the extent the prior decision has binding force. (*See City of Oakland v. Oakland W. Ets. Co.* (1912) 162 Cal. 675, 677-678 [124 P. 251] [prior decision binding on points concurred in by the requisite number of judges, not binding on others].) Because the judgment in *Hamilton I* was vacated, that decision, of course, is a nullity and as such has no binding force.

1. *Guilt Issues*

Pursuant to the mandate of the United States Supreme Court referred to above, we have reexamined that part of our former opinion dealing with the issues relating to guilt. (*Hamilton I*, *supra*, 41 Cal.3d at pp. 419-431.) Inasmuch as we deem it unnecessary to alter or amend our prior decision in that regard, we adopt it as our decision in this proceeding.

2. *Special Circumstance Issues*

(2) Renewing the point he made in *Hamilton*, defendant contends the court erred by failing to instruct the jury that intent to kill was an element of the felony-murder special circumstance. The claim must be rejected.

In *People v. Anderson*, *supra*, 43 Cal.3d at page 1147, we held that the court must instruct on intent when there is evidence from which the jury

could find that the defendant was an aider and abettor rather than the actual killer. In this case, of course, all the evidence showed that defendant either actually killed Buchanan or was not involved in the crime at all; there was no evidence that he was an aider and abettor. Thus, the court did not err by failing to instruct on intent.

Since we have concluded that the court was not obligated to instruct on intent, we are not required to reach the issue to which the high court's remand order directed us—i.e., whether the failure to instruct on intent is subject to harmless-error analysis—and accordingly decline to do so.[*]

3. *Penalty Issues*

At the penalty phase the prosecution presented evidence to show that defendant, who was 29 years of age at the time of trial in 1981, had been involved in serious criminal activity virtually all his adult life. It was stipulated that defendant had suffered felony convictions for the following offenses: a 1971 forgery, two 1972 burglaries, a 1976 auto theft, and a 1976 Louisiana burglary.

The prosecution presented evidence that defendant robbed one Ruth Story on November 17, 1976. On that date, Story was about 55 years old and walked with a cane. As she was returning home from a store, she encountered a man and woman whom she did not know. The man knocked her to the ground and attempted to take her purse from her shoulder; she tried to get up, he pulled her into the street, she again tried to get up, he again knocked her to the ground and then pulled her onto the sidewalk, took her purse, struck her three times in the face with his fist causing serious injuries, and thereupon fled with his woman companion.

While he was in custody in Louisiana for his 1976 burglary, defendant wrote to Officer Patrick Blow of the San Diego Police Department. In his letter he complained that the Louisiana authorities had "railroaded" him and were subjecting him to physical abuse; stated that he wished to return to the San Diego area; confessed to the Story robbery; and requested that Blow urge the district attorney to have him extradited.

Subsequently, the San Diego police showed Story a photographic lineup in which defendant's picture appeared. Story identified defendant as the

[*]Defendant also contends the felony-murder-burglary special-circumstance finding must be set aside on the ground that the death penalty law does not include the burglary of a vehicle within the scope of this special circumstance. Because he has failed to show that the other special circumstance findings are invalid on any ground, defendant is properly death-eligible. (Pen. Code, § 190.2, subd. (a).) Hence, we need not reach this issue.

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perpetrator, stating she was "about 80 percent certain." At a live lineup, however, Story failed to identify defendant as the perpetrator. She similarly failed to identify him at the preliminary hearing. Nevertheless, defendant was held to answer.

Not long after the preliminary hearing, defendant wrote to Story. In his letter he stated, "I know you don't know me personally, but I am the man accused in that November 1976 incident where you were robbed and hurt." He then said that he had made the confession in his letter to Officer Brow solely to be extradited from Louisiana, and that the confession was not true. Finally, he asked her help in clearing him of the robbery charge.

A few days later, defendant wrote to the San Diego District Attorney. In his letter, he said that he had made his confession as a result of coercion and was innocent of the robbery charge, and that it was in the office's best interests to dismiss the case. He added: "Your victim definitely knows me Personally and intimately. Back in 1967-68 and '69, when I was just a young buck, she used to pay me for my sexual services. . . . She is an alcoholic and sex freak, which is no crime, but the fact is, she knows me and would therefore would [sic] know if I was the one who robbed her, of [sic] which she has already said I wasn't."

At the penalty phase, Story identified defendant as her assailant. She stated: "The way [defendant] sets his mouth looks very much the same as the man set his mouth when he hit me."

The prosecution called one Rosie Blackmon to prove that she had twice suffered battery at defendant's hands. Blackmon testified that from late 1978 to early 1979 she and defendant were lovers; she worked driving a taxi cab, and was studying to become a truck driver; the pair discussed marriage, but defendant stated he did not want his wife to drive trucks; one morning in February 1979, defendant prevented her from going to truck driver school by beating her about the head with his fist, and she subsequently ended their relationship; a couple of weeks later, defendant accosted her at her place of employment, she responded she had nothing to say to him, and he then knocked her down with a punch to the head and proceeded to kick her head, face, and arms.

The prosecution also presented evidence that on the morning of October 8, 1980, deputy sheriffs made a number of unsuccessful attempts to get defendant out of bed to attend trial; finally, defendant jumped to his feet, raised his fists to the deputies, resisted their efforts to take him to court, pulled observation, and spat in one deputy's face. Defendant attempted to show that he had been provoked and was subjected to excessive force.

In its case, the defense presented evidence to portray defendant a human being and thereby move the jury to exercise mercy. In substance evidence presented consisted of the testimony of family members friends who asked that the jury spare defendant's life. These witne recalled defendant's religious upbringing, spoke of his human side, recounted how he had been affected by the death of his younger brot

a. Right to Self-representation

Defendant contends that he was denied his constitutional right to rep sent himself at the penalty phase in violation of *Faretta* v. *California* (19 422 U.S. 806 [45 L.Ed.2d 562, 95 S.Ct. 2525]. Specifically, he claims court erred by denying a motion he filed on December 27, 1980, in which requested that the court "relieve counsel or in the alternative permit defe sent [to] represent himself."

To properly address the contention, we must summarize certain even that occurred before the court made the ruling at issue. Evidently at a raignment on July 12, 1979, Patrick O'Connor was appointed to represe defendant. On September 25, 1979, on defendant's motion O'Connor w relieved on the ground of incompatibility, and Jerome Wallingford w appointed in his place. On November 7, 1979, dissatisfied with the represe tation that Wallingford was providing, defendant again made a motion relieve counsel; Wallingford joined in the motion; the court, however, d nied the request. On November 26, 1979, apparently on defendant's motio Wallingford was relieved and Thomas Ryan and Vivian Cumberg we appointed in his place. On May 1, 1980, defendant filed a motion requesti that the court relieve Ryan and Cumberg and permit him to represe himself. At a hearing on May 9, 1980, defendant withdrew his motion a made a new motion requesting that the court appoint him as cocounsel; t court granted this request. On May 20, 1980, defendant, complaining their performance, again moved to have Ryan and Cumberg relieved and be permitted to represent himself. Finding inter alia that defendant did have "a legitimate objection, but [was] only grasping at anything he co think of to delay the proceedings," the court denied the motion.

On October 2, 1980, trial commenced with jury selection. On October 1 1980, defendant again filed a motion to represent himself. On October 2 1980, however, he asked that his motion be taken off calendar, stating a follows: "I looked at the problems involved and I feel that [they are] most misinterpretations and misunderstandings that possibly could be worke out . . . . I don't want new counsel and then again I don't think pro. per. the answer to my problems I have right now." On November 3, 198 defendant revived his motion, claiming essentially that counsel's perfor

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mance was inadequate in several particulars. Counsel responded with apparently satisfactory explanations on all counts. Finding inter alia that counsel "have done everything possible as far as I have been able to ascertain in the proper representation of Mr. Hamilton," and that defendant had a "proclivity to substitute counsel," the court denied the motion. Later that same day, the guilt phase began with preinstructions to the jury. On November 17, 1980, and December 8, 1980, defendant renewed his request to represent himself, each time without success. On December 9, 10, 12, and 15, 1980, defendant made a variety of complaints about counsel's performance, but was unable to persuade the court that any of them had merit. On December 16, 1980, the jury commenced deliberations.

On January 6, 1981, the jury returned its guilt phase verdicts and defendant filed the motion now in issue—viz., the request that "the court relieve counsel or in the alternative permit defendant [to] represent himself" during the penalty phase. The motion was based on the ground that counsel performed inadequately and failed to adopt the strategy and tactics defendant had proposed. That same day, the court appears to have summarily denied the motion.

At a hearing on January 15, 1981—five days before the penalty phase opened—defendant renewed his motion. Again, the court denied his request. In so ruling it stated as follows.

"I have had the opportunity to see this case from beginning to end and I think that Mr. Ryan and Miss Camberg have done an outstanding job in their representation of the defendant in the face of real adversity through Mr. Hamilton putting stumbling blocks in their path at almost every turn. [¶] It is almost as if Mr. Hamilton were attempting to sabotage his case. [¶] The complaints that Mr. Hamilton has made are, I find, totally and completely without merit.

"I think it would be a real travesty and a mockery if I were to permit Mr. Hamilton to represent himself. He has had violent confrontations with the deputies in the jail. He has had violent confrontations with other persons.

"I have found it necessary for Mr. Hamilton to be handcuffed and in shackles, in effect during the entire trial because I was, frankly, concerned about violence here in the courtroom, about his attacking anybody that might be immediately at hand, and I can assure you that I would be the most disturbed person in the world if I hadn't required that he be in shackles and somebody, either his attorneys or somebody close to Mr. Hamilton in the courtroom were seriously injured.

"I don't see that there is any change. I don't feel there is any change whatever in my feeling relative to Mr. Hamilton representing himself. He certainly can't represent himself, being in chains.

"Certainly, he'd be in an awfully awkward position to be attempting to roam around the courtroom with his exhibits in the condition he is in, and I am certainly not going to release him from the shackles during the balance of the trial.

"I can only say that Mr. Hamilton has done many things that he shouldn't have done during the course of the trial. He has seemed to, as I have indicated, put stumbling blocks in the path of his attorneys. He has made suggestions which were absolutely preposterous as far as trial tactics are concerned, and if he had followed those tactics, it would have been even, I mean, the result would have been absolutely disastrous from his standpoint of the presentation.

"I can't conceive of Mr. Hamilton representing himself in this final phase, the penalty phase of the trial, the portion of the trial which is going to determine whether he is sentenced to life imprisonment or whether he is sentenced to death. I think it would be a real travesty if I were to do otherwise."

In *People* v. *Windham* (1977) 19 Cal.3d 121 [137 Cal.Rptr. 8, 560 P.2d 1187], we held that "in order to invoke the constitutionally mandated unconditional right of self-representation a defendant in a criminal trial should make an unequivocal assertion of that right within a reasonable time prior to the commencement of trial. Accordingly, when a motion to proceed *pro se* is timely interposed, a trial court must permit a defendant to represent himself upon ascertaining that he has voluntarily and intelligently elected to do so, irrespective of how unwise such a choice might appear to be. Furthermore, the defendant's 'technical legal knowledge' is irrelevant to the court's assessment of the defendant's knowing exercise of the right to defend himself. [Citation.] However, once a defendant has chosen to proceed to trial represented by counsel, demands by such defendant that he be permitted to discharge his attorney and assume the defense himself shall be addressed to the sound discretion of the court. When such a midtrial request for self-representation is presented the trial court shall inquire *into* *sua sponte* into the specific factors underlying the request thereby ensuring a meaningful record in the event that appellate review is later required. Among other factors to be considered by the court in assessing such requests made after the commencement of trial are the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or

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delay which might reasonably be expected to follow the granting of such a motion. Having established a record based on such relevant considerations, the court should then exercise its discretion and rule on the defendant's request." (*Id.* at pp. 127-129, fns. omitted.)

We are of the opinion that the court's denial of the motion in question was not error. (3a) Because defendant's request was filed in the midst of the jury's guilt phase deliberations, it was not timely for purposes of invoking an absolute right of self-representation under *Faretta* v. *California*, *supra*, 422 U.S. 806. (*Hamilton I*, *supra*, 41 Cal.3d at p. 421 [motion made after jury selection but before opening statements held untimely].) Accordingly, it was within the court's discretion to grant the request or not. (4) On review we cannot conclude that the court abused its discretion in denying the motion: having considered the *Windham* factors, the court made the reasonable determination that defendant should not be permitted to represent himself at the penalty phase. The fact that the court considered such irrelevant factors as defendant's inability "to roam around the courtroom" in shackles and his lack of competence in law does not undermine the soundness of its determination.

(3b) Defendant claims that his *Faretta* motion was indeed timely and hence effectively invoked an unconditional right of self-representation. He argues that the penalty phase of a capital trial amounts in actuality to a separate trial, and that he made his motion within a reasonable time prior to the commencement of that phase. We must reject the point because its predicate is unsound.

First, as even defendant acknowledges, the penalty phase has no separate formal existence but is merely a stage in a unitary capital trial. Second and more important, the connection between the phases of a capital trial is substantial and not merely formal. For example, Penal Code section 190.4, subdivision (c), provides that as a general matter "If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to [Penal Code] Section 1026, the truth of any special circumstances which may be alleged, and the penalty to be applied . . . ." Subdivision (d) of that same section declares that "In any case in which the defendant may be subject to the death penalty, evidence presented at any prior phase of the trial, including any proceeding under a plea of not guilty by reason of insanity pursuant to Section 1026 shall be considered at any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase."

Thus, we conclude that defendant was not denied a constitutional right of self-representation.

b. *Constitutionality of the Sentencing Formula of Penal Code Section 190.3*

(5) Defendant contends that the sentencing formula of Penal Code section 190.3 (hereafter section 190.3) is unconstitutional on the ground that it withdraws from the trier of fact constitutionally compelled discretion and thereby undermines the reliability of the verdict. Section 190.3, subdivision (k) states in relevant part that "the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." The point defendant makes here, however, was rejected in *People* v. *Brown* (1985) 40 Cal.3d 512, 538-544 [220 Cal.Rptr. 637, 709 P.2d 440], reversed on other grounds *sub nomine California* v. *Brown* (1987) 479 U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837].

c. *Brown Error*

(6) Defendant may be understood to contend that former CALJIC No. 8.84.2, incorporating the mandatory sentencing language of section 190.3, may have misled the jurors to his prejudice as to the scope of their sentencing responsibility and discretion in violation of the constitutional principles set forth in *People* v. *Brown*, *supra*, 40 Cal.3d at pages 538-544.

In *Brown* we held that section 190.3, as construed therein, was not unconstitutional. (40 Cal.3d at pp. 538-544.) In conformity with settled constitutional principles, we interpreted the statutory language to require jurors to make " 'an individualized determination on the basis of the character of the individual and the circumstances of the crime' " (id. at p. 540, italics deleted) and a " ' . . . moral assessment of [the] facts . . . ' " (*Ibid.*)—and thereby decide "which penalty is appropriate in the particular case" (*id.* at p. 541).

Although in *Brown* we upheld the constitutionality of section 190.3, we nevertheless recognized that when delivered in an instruction the provision's mandatory sentencing language might mislead jurors as to the scope of their sentencing discretion and responsibility. (40 Cal.3d at p. 544, fn. 17.) Specifically, we believed that a juror might reasonably understand that language to define the penalty determination as "simply a finding of facts" (*id.* at p. 540) or "a mere mechanical counting of factors on each side of an imaginary 'scale' " (*id.* at p. 541). We also believed that a juror might reasonably understand the language to require him to vote for death if he finds that the evidence in aggravation outweighs the evidence in mitigation—even if he determines that death is not the appropriate penalty under all the

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circumstances. (See *id.* at pp. 540-544.) For this reason we directed trial courts thereafter to instruct jurors in conformity with the principles set forth therein, rather than in the bare words of the statute. (*Ibid.*) With respect to cases—such as the present—in which the jurors had been instructed in the statutory language, we announced that we would examine each such appeal on its merits to determine whether the jurors may have been misled to the defendant's prejudice. (*Ibid.*)

We turn now to the case at bar. After reviewing the record of the penalty phase in its entirety, we cannot conclude that the jurors may have been misled to defendant's prejudice by former CALJIC No. 8.84.2. Indeed, we believe that they were adequately informed as to what they were to do, and how they were to proceed, in the determination of penalty, and that neither concern expressed in *Brown* was substantially implicated. In support we make the following observations. First, although in closing argument the prosecutor referred briefly to the mandatory sentencing language, he clearly acknowledged that the jurors were "called upon to make the tremendous decision, tough decision," and were given discretion by the law to that end. Second, in his closing argument defense counsel emphasized that it was the responsibility of the jurors, and the jurors alone, to determine whether the death penalty was appropriate for defendant. Third, at defendant's request the court instructed the jurors as follows: "In weighing the aggravating and mitigating factors, you are not to merely count numbers on either side. You are instructed rather to weigh and consider the factors on each side as a whole"; and, "In order to impose a death sentence, you must be convinced beyond a reasonable doubt that the totality of the aggravating circumstances outweigh[s] the totality of the mitigating circumstances."

Thus, on this record we find no *Brown* error.

d. *Easley "Factor (k)" Error*

(7) Defendant may be understood to contend that the pre-*Easley* (*People v. Easley* (1983) 34 Cal.3d 858 [196 Cal.Rptr. 309, 671 P.2d 813]) CALJIC No. 8.84.1 (k) instruction (hereafter former factor (k)), which was given in this case, may have misled the jurors as to the scope of their sentencing responsibility and discretion to defendant's prejudice.

Pursuant to former CALJIC No. 8.84.1, the court instructed the jurors that in determining the penalty they should consider several specified circumstances and also "(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

In *People v. Easley*, *supra*, 34 Cal.3d 858, we concluded that the language of former factor (k) might mislead the jurors about the scope of their

discretion and responsibility under the federal Constitution as construed in *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [57 L.Ed.2d 973, 989-990, 98 S.Ct. 2954], and *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110 [71 L.Ed.2d 1, 8, 102 S.Ct. 869], in which the United States Supreme Court held that a sentencer may " 'not be precluded from considering *as a mitigating factor*, any aspect of the defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death.' " (Italics in original.)

Because of the potentially misleading language of the instruction, we directed trial courts thereafter to inform the jury that they may consider in mitigation not only factor (k) but also "any other 'aspect of [the] defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death.' " (34 Cal.3d at p. 878, fn. 10.)

In *People v. Brown*, *supra*, 40 Cal.3d 512, we announced that with respect to cases—such as the present—in which the jury had been instructed pursuant to the former factor (k), we would examine each such appeal on its merits to determine whether the jury may have been misled to the defendant's prejudice. (*Id.* at p. 544, fn. 17.) In conducting such an examination, we look to " 'the totality of the penalty instructions given and the arguments made to the jury' . . . ." (*People v. Rodrigues* (1986) 42 Cal.3d 730, 786 [230 Cal.Rptr. 667, 726 P.2d 113].)

We turn now to the case at bar. After reviewing the record of the penalty phase in its entirety, we cannot conclude that the jurors may have been misled to defendant's prejudice by the former factor (k) instruction. Indeed, we are of the opinion that the jurors were in fact adequately informed that they could consider character and background evidence. After the defense presented a case that consisted entirely of such evidence, the court instructed the jurors as follows: "The mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death sentence upon Mr. Hamilton. You should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances presented as reasons for not imposing the death sentence."

Thus, on this record we find no *Easley* "factor (k)" error.

e. *Ramos Error*

(8) Defendant contends that the court committed reversible error under *People v. Ramos* (1984) 37 Cal.3d 136 [207 Cal.Rptr. 800, 689 P.2d 430]. In accordance with the so-called Briggs Instruction (former CALJIC No.

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8.84.2 (1979)) the court delivered the following charge: "You are instructed that under the state Constitution, a governor is empowered to grant a reprieve, pardon or commutation after sentence following conviction of a crime. Under this power a governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole."

In *People* v. *Ramos, supra*, 37 Cal.3d at page 153, we held that "the Briggs Instruction is incompatible with [the] guarantee of 'fundamental fairness' [established in the due process clauses of our Constitution (Cal. Const., art. I, §§ 7, 15)] both because it is seriously and prejudicially misleading and because it invites the jury to be influenced by speculative and improper considerations."

As to the misleading character of the instruction, we stated as follows. "Under the California Constitution, the Governor's power of commutation or pardon extends equally to a sentence of death and to a sentence of life without possibility of parole. [Citation.] The Briggs Instruction, however, informs the jury only that a sentence of life without possibility of parole may be commuted. Although the instruction is literally accurate as far as it goes, it is a classic example of a misleading 'half-truth.' Since the instruction is only given in a penalty trial—when the jury's attention is narrowly focused on two alternative punishments—the instruction would reasonably be understood by the average juror to mean, by negative implication, that while a sentence of life without possibility of parole may be commuted, a sentence of death may not. Viewed realistically and in context, the instruction provides the jury with seriously misleading information." (37 Cal.3d at p. 153, fn. omitted.)

Further, we explained that "there are a variety of reasons why . . . consideration [of the commutation power] is improper. The first and perhaps most obvious problem is the speculative nature of the inquiry that the instruction invites. . . . [¶] . . . Here, the jury must attempt to determine not only what a particular defendant will be like in the future but also what some presently unknown person—a future Governor—will do in response to the defendant's then condition. . . . [¶] Furthermore, . . . any instruction which draws the jury's attention to the possibility of future actions by a governor or parole board is likely to affect the jury's decisionmaking process in either of two illegitimate—though very different—ways, diverting the jury from its proper function. [¶] The first vice of such an instruction . . . is that it may tend to diminish the jury's sense of responsibility for its action." (*Id.* at pp. 156-157.) "Second, . . . an instruction on the possibility of commutation invites the jury to go beyond its proper role and attempt to 'preempt' the Governor's constitutional authority by imposing a sentence

that will at least minimize the opportunity for such a commutation." (*Id.* at p. 158.)

Under *Ramos*, we conclude that the court erred by charging the jury in accordance with the Briggs Instruction: the language of the instruction is misleading and invites speculation on irrelevant and improper matters.

The Attorney General argues in substance that a supplementary charge, delivered by the court immediately after the Briggs Instruction, made that instruction nonerroneous or in any event nonprejudicial. As relevant here, the court's full instructions were as follows.

"It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on Mr. Hamilton.

"You are instructed that under the state Constitution, a governor is empowered to grant a reprieve, pardon or commutation after sentence following conviction of a crime. Under this power a governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole. This is subject to the requirement that, in the case of any person twice convicted of a felony, a commutation or modification may not be granted absent the written recommendation of at least four justices of the California Supreme Court. Further, a life sentence requires a minimum incarceration of 25 years less one third off for good time credits before parole may be considered by the proper authorities.

"You are now instructed, however, that the matter of a possible commutation or modification of sentence is not to be considered by you in determining the punishment for Mr. Hamilton. You must not speculate as to whether such commutation or modification would ever occur. It is not your function to decide now whether this man will be suitable for parole at some future date. So far as you are concerned, you are to decide only whether this man shall suffer the death penalty or whether he shall be permitted to remain alive. If upon consideration of the evidence you believe that life imprisonment without possibility of parole is the proper sentence, you must assume that the governor, the Supreme Court, and those officials charged with the operation of our parole system will perform their duty in a correct and responsible manner, and that Mr. Hamilton will not be paroled unless he can be safely released into society. It would be a violation of your duty as jurors if you were to fix the penalty at death because of a doubt that the governor and other officials will properly carry out their responsibilities."

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arry out their responsibilities."

Having considered the matter closely, we cannot agree that the supplementary charge somehow rendered the Briggs Instruction free of error: that charge does not alter the objectionable language, which continues to mislead and to invite speculation on irrelevant and improper matters.

We do agree, however, that on this record the error was nonprejudicial. As stated above, the court instructed the jurors "*not* to consider[ ]" "the matter of a possible commutation or modification of sentence . . . in determining the punishment for Mr. Hamilton," "*not* [to] speculate as to whether such commutation or modification would ever occur," and "*not* . . . to decide now whether this man will be suitable for parole at some future date." Defendant argues that the supplementary charge did not cure the harm of the Briggs Instruction, but rather led the jurors to indulge in irrelevant and improper speculation. The clear meaning of the plain words of the admonition, however, refutes this argument.

The court also delivered the following charge. "I have previously read to you the list of aggravating circumstances which the law permits you to consider if you find that any of them is established by the evidence. These are the only aggravating circumstances that you may consider. You are not allowed to take account of any other facts or circumstances as the basis for deciding that the death penalty would be an appropriate punishment in this case."

Through these instructions, the court directed the jurors not to make any use of the Briggs Instruction in determining the penalty to be imposed on defendant. Jurors are, of course, presumed to follow the instructions given by the court. (E.g., *Delli Paoli* v. *United States* (1957) 352 U.S. 232, 242 [1 L.Ed.2d 278, 285-286, 77 S.Ct. 294].) In this case we find no reason to believe that the jurors failed to discharge their duty.

Defendant argues in substance that the prosecutor exploited the Briggs Instruction in closing argument and thereby made the harm threatened by the instruction incurable. The comment complained of is as follows: "Now, [defense counsel will] say, 'If you give him life in prison, he will have to spend the rest of his days thinking about his crimes and thinking about the victims.' No way. . . . This defendant wouldn't spend all his time in prison thinking about his horrible crime. He's be conniving and devising ways to manipulate the system and get out. Look at his letters [to Officer Birse, Ruth Story and the San Diego District Attorney's office] now, how he operates."

We do not believe that the prosecutor intended this comment to refer to the Briggs Instruction. Had he desired to anticipate that charge, he would

evidently have touched on the Governor's commutation power expressly or at least by clear implication. But as the words of the remark show, he did not do so. More important, we do not believe that the jury would have understood the comment to refer to the instruction: the remark does not even allude to the commutation power. In any event, the comment was brief and isolated. As such, it could not make the error in this case incurable.

Hence, we conclude that on the facts of this case the giving of the Briggs Instruction did not amount to reversible error.

f. Consideration of Invalid Felony-murder-burglary Special Circumstances

(9) Defendant contends that the felony-murder-burglary special-circumstance finding was invalid (see *ante*, fn. 7) and, as such, was improperly presented to the jurors as evidence in aggravation under the instruction directing them to consider "the existence of any special circumstance found to be true." He then contends that the error requires reversal. We cannot agree. Assuming for argument's sake that the finding was invalid, we are nevertheless of the opinion that even if the jurors had not been instructed to consider the existence of this finding, they still would have returned a verdict of death: whereas the evidence in aggravation—even without the finding—was overwhelming, the evidence in mitigation was minimal.

g. Failure to Exercise Discretion to Strike the Special Circumstance Findings

Defendant contends in substance that at the automatic penalty-modification hearing conducted pursuant to Penal Code section 190.4, subdivision (e), the court had the authority, under Penal Code section 1385 (hereafter section 1385), to strike the special circumstance findings "in furtherance of justice" in order that he might be eligible for parole. He further contends that the court failed to consider whether it should exercise that authority.

(10) We agree that under the 1978 death penalty law the court had the authority to strike the special circumstance findings pursuant to section 1385. Indeed, we so held in *People* v. *Williams* (1981) 30 Cal.3d 470 [179 Cal.Rptr. 443, 637 P.2d 1029].

We cannot agree, however, that the court failed to consider whether it should exercise this authority. On our reading of the record, the court appears to have impliedly determined that there was no basis for striking the special circumstance findings. As the court expressly found, "the evi-

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Defendant argues in substance that the court may nevertheless have entertained the erroneous belief that it was without authority to strike the special circumstance findings, and that it should be directed to determine whether or not there was a basis to strike those findings. We are not persuaded. The record contains no evidence suggesting that the court believed it was without such authority. In the absence of such evidence, we are unwilling to assume that the court may have entertained an erroneous belief as to the scope of its powers. We presume the court was aware of the general rule that section 1385 authorizes the court to dismiss "in furtherance of justice" in any circumstance in which the legislative body has not clearly manifested a contrary intent. (*People* v. *Superior Court* (*Howard*) (1968) 69 Cal.2d 491, 503-505 [72 Cal.Rptr. 330, 446 P.2d 138] [dismissing entire action].) We also presume the court read the death penalty law, as we subsequently did in *People* v. *Williams, supra*, 30 Cal.3d at pages 484-485, as not intended to limit the court's authority in the circumstances relevant here. Accordingly, we cannot conclude that the court erroneously believed it was without authority to strike the special circumstance findings under section 1385.

(11) Finally, we are of the opinion that in view of the theories presented and the evidence introduced, the jury's guilt phase verdicts imply a finding that defendant was the actual killer (*Enmund* v. *Florida* (1982) 458 U.S. 782, 788-801 [73 L.Ed.2d 1140, 1145-1154, 102 S.Ct. 3368]). Having reviewed the record in its entirety, we conclude that this finding is amply supported by the evidence and adopt it as our own. Accordingly, we hold that the imposition of the penalty of death on defendant does not violate the Eighth Amendment. (*Cabana* v. *Bullock* (1986) 474 U.S. 376, 386 [88 L.Ed.2d 704, 716, 106 S.Ct. 689, 697].)[*]

II. HABEAS CORPUS (CRIM. 25303)

In his petition for a writ of habeas corpus in Crim. 25303, defendant bases his claim to relief on three grounds. He first asserts he was not provided with effective assistance by trial and appellate counsel. (12) To establish such a point, a defendant must show that counsel (1) performed at a level below an objective standard of reasonableness under prevailing professional norms; and thereby (2) subjected the defense to prejudice, i.e., in

[*]After oral argument defendant submitted a number of motions in propria persona asking that appointed appellate counsel be relieved and other specified counsel be substituted in his place. Because each of these attorneys has declined to state he is available or has declared he is unavailable, we deny the motions.

the absence of counsel's failings a more favorable outcome was reasonably probable. (*People* v. *Ledesma* (1987) 43 Cal.3d 171, 216-218 [233 Cal.Rptr. 404, 729 P.2d 839].) As we shall explain, defendant fails to make a prima facie case of entitlement to relief.

(13) Defendant alleges broadly that trial counsel made various errors in strategy and tactics and, more specifically, that they feared him and treated him with distrust. Such assertions do not effectively allege either deficient performance or prejudice.

He also alleges appellate counsel refused to argue that facial expressions and gestures trial counsel assertedly made during jury selection prejudiced the defense. This statement too fails to effectively allege either deficient performance or prejudice.

Defendant next claims that he was denied due process because the trial judge was biased. In support of his point, he cites the following incidents: (1) in an in camera hearing the judge stated he believed trial counsel and did not believe defendant in a dispute as to whether counsel had threatened him with harm; and (2) in another in camera conference, the judge told him, "You have proven yourself an unmitigated liar during the course of this whole trial." (14) But the fact that the judge made these statements—each of which is more than adequately supported by the evidence—does not amount to a prima facie showing of bias: "'[W]hen the state of mind of the trial judge appears to be adverse to one of the parties but is based upon actual observance of the witnesses and evidence given during the trial of an action, it does not amount to . . . prejudice . . . .'" (*People* v. *Yeager* (1961) 55 Cal.2d 374, 391 [10 Cal.Rptr. 829, 359 P.2d 261].)

Defendant's final "claim" is in substance as follows: he states that at the new trial that might have followed our decision in *Hamilton I* the court would again deny his request to represent himself. Whether or not the court would so rule in the future raises no issue cognizable on habeas corpus. In any event, because we affirm the judgment in its entirety there will be no such new trial.

III. HABEAS CORPUS (8001870)

In his petition for a writ of habeas corpus in 8001870, defendant bases his claim to relief on what are in substance four grounds. He first asserts he was not provided with effective assistance by trial and appellate counsel. As will appear, he fails to make a prima facie case.

To begin with, we seriously doubt defendant has adequately alleged deficient performance on the part of counsel. His first complaint is that

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counsel failed to communicate with him or to allow him to participate in the development of strategy and tactics. The charge, however, is conclusory and without specificity. The second complaint is that counsel failed to fully investigate the facts of the case. This charge runs in substance as follows: Buchanan, as is undisputed, left class on the night of May 30, 1979, before an optional quiz was given; a copy of that quiz was subsequently found in the van; that copy—defendant conjectures—*must* have been brought to the van by one of Buchanan's classmates; that classmate—defendant declares—*may* have been the killer; counsel knew that Buchanan had left class before the quiz was given, and knew that a copy of the quiz was found in the van; therefore, counsel should have sought evidence about the classmate. We doubt, however, that counsel's performance can be called deficient. There was simply nothing more than the merest speculation that an unknown classmate may have gone to the van and may have killed Buchanan. Without something more, it is difficult to conclude that counsel was obligated to investigate further.

In any event, we are of the opinion that defendant has not adequately alleged prejudice. Indeed, he has wholly failed to show that absent counsel's alleged failings a more favorable outcome in the guilt phase was reasonably probable on the facts of this case.

Defendant next claims that the prosecution introduced "False evidence . . . substantially material or probative on the issue of guilt" (Pen. Code, § 1473, subd. (b)(1)). His complaint is in essence as follows: the optional quiz *must* have been brought into the van by one of Buchanan's classmates; the prosecution was aware of this fact, but presented its case as though Buchanan brought the quiz to the van herself. The premise is unsound: the record establishes that after class Buchanan spoke with friends who had taken the quiz, probably obtained a copy from one of them, and therefore may have brought it to the van herself. Hence, defendant fails to make a prima facie case.

(15) Defendant also claims that he had a right to be present at a pretrial hearing conducted on July 6, 1981. At that hearing, the court in essence established a schedule under which a defense criminologist could examine the van, which was then in storage in Oklahoma, before it was driven back to California by agents of the prosecution. Again, as will appear, no prima facie case is made.

It is the rule that "the accused is not entitled to be personally present . . . [on] matters in which defendant's presence does not bear a '"reasonably substantial relation to the fullness of his opportunity to defend against the charge."'" (*People* v. *Jackson* (1980) 28 Cal.3d 264, 309 [168 Cal.Rptr.

603, 618 P.2d 149], citing cases (plur. opn.).) Under this rule, defendant did not have a right to be present at the hearing: his attendance at what was essentially a scheduling hearing would not have been useful or of benefit to the defense.

(16) Defendant's final claim is that the prosecution interfered with his attempt to obtain evidence. Specifically, he charges that the prosecution had the van examined and cleaned before the defense criminologist could subject it to inspection and tests. It is of course the rule that "in no event can duly constituted authority hamper or interfere with efforts on the part of an accused to obtain [evidence] . . . , without denying him due process of law." (*In re Martin* (1962) 58 Cal.2d 509, 512 [24 Cal.Rptr. 833, 374 P.2d 801] [blood sample to determine intoxication].) The petition, however, fails to adequately allege interference: it states that the prosecution had the van examined and cleaned before the defense criminologist could begin his work; it does not state that the criminologist acted without undue delay or that the delay on his part was attributable to the prosecution.

The judgment is affirmed. The petition for writ of habeas corpus in Crim. 25303 is denied. The petition for writ of habeas corpus in S001870 is denied.

Lucas, C. J., Panelli, J., Arguelles, J., Eagleson, J., and Kaufman, J., concurred.

BROUSSARD, J.—Concurring and dissenting.—I concur in the affirmance of the findings of guilt and special circumstances and in the denials of the petitions for writ of habeas corpus. I dissent from the affirmance of the death penalty.

The majority properly conclude that the trial court erred in giving an instruction in accordance with the so-called Briggs Instruction (former CALJIC No. 8.84.2 (1979)) on the Governor's power to commute a sentence of life without possibility of parole. (*People* v. *Ramos* (1984) 37 Cal.3d 136, 153 [207 Cal.Rptr. 800, 689 P.2d 430].) As the majority recognize, the language of the instruction is misleading and invites speculation on irrelevant matters. However, the majority also conclude that subsequent instructions telling the jury to disregard the Governor's power to commute eliminated any prejudice. I do not agree.

In my view the error was prejudicial. I cannot agree that the later instructions unrung the bell. Far from unringing the bell, the subsequent instructions could only have the effect of reminding the jury again and again of the Governor's commutation power. Furthermore the prosecutor exploited the error in closing argument. To conclude that, when the cacophony was

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complete and overwhelming, there was no prejudice is to turn a deaf ear to fairness and justice.

The Briggs Instruction has been uniformly held to be prejudicial error in a penalty trial because it is so misleading as to constitute a denial of due process, improperly tilting the jury in favor of the death penalty. (*People* v. *Anderson* (1987) 43 Cal.3d 1104, 1150-1151 [240 Cal.Rptr. 585, 742 P.2d 1306]; *People* v. *Myers* (1987) 43 Cal.3d 250, 272-273 [233 Cal.Rptr. 264, 729 P.2d 698]; *People* v. *Monteil* (1985) 39 Cal.3d 910, 928 [218 Cal.Rptr. 572, 705 P.2d 1248]; *People* v. *Haskett* (1982) 30 Cal.3d 841, 861-863 [180 Cal.Rptr. 640, 640 P.2d 776].) In *Anderson*, it is stated that the Briggs Instruction "necessarily subjects the defendant to prejudice." (43 Cal.3d at p. 1151.) As pointed out in *Myers*: "The Attorney General . . . has cited no instance, and we are aware of none, in which this type of instructional error has been found nonprejudicial in a death penalty case, and in view of the very serious potential for prejudice emphasized in *Ramos*, we strongly doubt whether we could ever confidently conclude that there was no reasonable possibility that this instruction improperly tainted the jury's decision-making process." (43 Cal.3d at p. 272.)

In *Myers*, the defendant introduced evidence of the past practices of California governors to show that it was extremely unlikely that he ever would be released if sentenced to life without possibility of parole. The court concluded that far from neutralizing the improper instruction "in reality the additional focus on commutation in this case had the inevitable and unfortunate effect of highlighting the ostensible importance of the commutation question." (43 Cal.3d at pp. 272-273.)

In this case the trial court's instruction to the jury that it was their duty to determine whether death or confinement in state prison without possibility of parole should be imposed on defendant was followed immediately by its instruction on the Governor's commutation power. The court thereby emphasized the importance of the instructions on the Governor's powers, suggesting that they are the first and most important step in the process of determining the penalty.[1]

[1] "It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on Mr. Hamilton.

"You are instructed that under the state Constitution, a governor is empowered to grant a reprieve, pardon or commutation after sentence following conviction of a crime. Under this power a governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole.

"This is subject to the requirement that, in the case of any person twice convicted of a felony, a commutation or modification may not be granted absent the written recommendation

The importance of the Governor's powers was further emphasized because of their length; the instructions went beyond those contemplated by Penal Code section 190.3, the Briggs Instruction.

The first instruction was not limited to the Governor's power to commute a sentence of life imprisonment without possibility of parole. Rather it spoke of the Governor's powers generally. Subsequent instructions told the jury of the Governor's power to commute a sentence of life imprisonment without possibility of parole to a sentence of life imprisonment with parole, a limitation on the power, and the effect of a commutation. The instructions did not stop with the instruction contemplated by Penal Code section 190.3 condemned in *Ramos* but repeatedly emphasized the Governor's power. The instructions thus were not the brief but invalid reference to the Governor's power contemplated by Penal Code section 190.3 but included in addition an instruction applicable to a death sentence and instructions detailing matters which could only serve to toll the bell repeatedly. While the majority concede that error occurred (maj. opn., p. 374), they do not recognize the full scope of the error.

The majority further take the position that subsequent instructions told the jury to disregard the prior instructions, that we must presume the jury followed the later instructions and that they eliminated the prejudice due to the erroneous instructions on the Governor's powers. (Maj. opn., *ante*, at p. 375.)

I doubt whether any instruction could eliminate the prejudice flowing from the improper and detailed emphasis placed on the Governor's commutation power. The power was given too much importance and emphasis to allow further instructions to eliminate the prejudice. Furthermore the subsequent instructions given in the instant case were in themselves erroneous, confusing and contradictory and, when all was said and done, probably left the jury with the view that it should consider the Governor's powers so long as it assumed that the powers would be properly exercised. Such instructions do not eliminate the prejudice flowing from the improper mention of the Governor's powers; they exacerbate the prejudice.[1]

of at least four justices of the California Supreme Court. Further, a life sentence requires a minimum incarceration of 25 years less one third off for good time credits before parole may be considered by the proper authorities."

[1] "You are now instructed, however, that the matter of a possible commutation or modification of sentence is not to be considered by you in determining the punishment for Mr. Hamilton. You must not speculate as to whether such commutation or modification would ever occur.

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Like the evidence of past Governor practices in *People* v. *Myers, supra,* 43 Cal.3d 250, 272-273, the instructions relied upon by the majority in the instant case, far from neutralizing the improper instructions on the commutation power, served to emphasize the commutation question. The jury was initially told not to consider a possible commutation or to speculate whether there would be a commutation, and it was not its function to determine whether defendant would be suitable for parole at a later date. But telling the jury not to consider a possible commutation, to speculate, or to decide whether this man will be suitable for parole at some later date simply emphasizes the commutation question in the juror's mind.

Moreover, the jury was not told to ignore the Governor's power but was told that the Governor, the Supreme Court and the parole officials would properly perform their duties. In *Ramos,* after concluding that fundamental fairness precluded telling the jury of the commutation power, the court addressed the question whether the jury should be told *not* to consider the Governor's commutation power. While we recognized that in some circumstances not relevant here the jury might be told to disregard the power, we concluded that the jury should not be so instructed because the instruction "is simply more likely to bring the matter to the jury's attention and, as a practical matter, be difficult to follow." (37 Cal.3d at p. 159, fn. 12.) Accordingly, even if no commutation instruction had been given, it would have been error in the instant case to give the supplementary instructions because they called the jury's attention to the commutation issue. To conclude, as the majority do, that an instruction which is erroneous because it may call the jury's attention to a prejudicial matter somehow eliminates the prejudice in other instructions which call the jury's attention to the very same prejudicial matter involves a mental exercise incomprehensible to me.

But even if we accept the majority's thesis that somehow instructions which are error because of their prejudicial effect can somehow cure other instructions which are error because they have the same prejudicial effect, we still must look at the content of the subsequent instructions of the trial court.

"It is not your function to decide now whether this man will be suitable for parole at some future date. So far as you are concerned, you are to decide only whether this man shall suffer the death penalty or whether he shall be permitted to remain alive.

"If upon consideration of the evidence you believe that life imprisonment without possibility of parole is the proper sentence, you must assume that the Governor, the Supreme Court, and those officials charged with the operation of our parole system will perform their duty in a correct and responsible manner, and that Mr. Hamilton will not be paroled unless he can be safely released into society.

"It would be a violation of your duty as jurors if you were to fix the penalty at death because of a doubt that the Governor and other officials will properly carry out their responsibilities." (Italics added.)

Far from being told that it was improper to consider the possibilities of commutation and subsequent parole, the jury was told that it should consider those possibilities but only in the perspective that, when and if defendant was paroled, it would be done lawfully. The instructions to disregard and not to consider were literally contradicted and the jury was left with not only erroneous instructions but also contradictory and confusing instructions as to the importance of the Governor's commutation power.

What did this jury do when faced with confusing and conflicting instructions concerning the Governor's commutation power? All we can do is guess. I suspect that the jury may have concluded that it should not try to determine whether this defendant would have his sentence commuted and obtain a parole but that it must conclude that the commutation power was a factor militating against life imprisonment without possibility of parole and in favor of the death penalty and that it must assume that if defendant was paroled it would be done lawfully. To execute a defendant based on the Governor's power to commute sentences whether done lawfully or unlawfully violates the fundamental fairness guaranteed by the due process clause of our state Constitution.

The prosecutor exploited the fundamental unfairness of the instructions in his closing argument. The prosecutor suggested that if defendant received a sentence of life imprisonment he "wouldn't spend all his time in prison thinking about his horrible crimes. He'd be conniving and devising ways to *manipulate the system and get out.* . . . Look at his letters [to Officer Burse, Ruth Story and the San Diego District Attorney's office] now, how he operates." (Italics added.) The comment is a direct comment on the possibility that defendant would be paroled. The only way that he could "manipulate the system and get out" by appealing to governmental authorities was through exercise of the commutation power. The majority suggest that the prosecutor was only trying to state that defendant was lacking in feeling and self-centered (maj. opn., p. 374), but the comment speaks for itself.

In the instant case the instructions discussing the Governor's powers were as long as those setting forth and defining the aggravating and mitigating circumstances which should control the application of the death penalty. I am satisfied that the instructions on the Governor's powers were more harmful than any we have seen in prior cases. The supplemental instructions relied upon by the majority did not eliminate the prejudice but could only have emphasized the commutation power and confused the jury into

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believing that the power was an important matter, if not the most important matter, to be considered by the jury in determining the penalty. The prosecutor referred to possible parole in his closing argument, and the prejudice from the errors is overwhelming.

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APPENDIX 1-B

[Crim. No. 21958. Dec. 31, 1985.]

THE PEOPLE, Plaintiff and Respondent, v.
BERNARD LEE HAMILTON, Defendant and Appellant.

SUMMARY

Following a jury trial, defendant was convicted of first degree murder, burglary, robbery, and kidnapping. Special circumstances allegations that the murder was committed while defendant was engaged in or was an accomplice in the commission of robbery, burglary, and kidnapping were found to be true. The jury fixed the punishment at death. (Superior Court of San Diego County, No. 47283, Franklin B. Orfield, Judge.)

The Supreme Court affirmed the judgment of guilt, but set aside the special circumstances findings and reversed the penalty judgment. The court held the trial court's failure to instruct the jury that in order to find true the special circumstances allegations, it must find an intent to kill, was reversible error. The only theory on which the jury was instructed vis-à-vis the murder was felony murder, which does not require a finding of intent to kill. The court held the evidence did not establish intent to kill as a matter of law, where the coroner was unable to determine the cause of death of the victim, or whether her head and hands were cut off before or after death, where the one stab wound that was inflicted before death was nonfatal, and where it was possible the victim might have been killed accidentally, with defendant deciding afterwards to mutilate her body in an attempt to prevent its identification. (Opinion by Kaus, J.,* with Broussard and Reynoso, JJ., concurring. Separate concurring opinions by Grodin, J., and by Bird, C. J. Separate concurring and dissenting opinions by Lucas, J., and by Mosk, J.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a-1f) **Criminal Law § 87—Rights of Accused—Aid of Counsel—Self-representation—Discretion of Trial Court.**—Unless a defendant's

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

motion to proceed in propria persona is made within a reasonable time before commencement of trial, it does not invoke the constitutionally mandated unconditional right of self-representation, but puts the matter within the court's discretion. In a prosecution for first degree murder and other offenses, the trial court properly exercised its discretion in denying defendant's motion to proceed in propria persona, where the motion, which was made in the context of a hearing on motions to exclude evidence and set aside the indictment, was untimely, in that the hearing had begun two months earlier and had produced several days of testimony, and where the court noted defendant had not stated a valid reason for relieving counsel and was grasping at anything to delay the proceedings.

(2a-2f) **Criminal Law § 87—Rights of Accused—Aid of Counsel—Self-representation—Discretion of Trial Court.**—In exercising its discretion in determining whether to grant defendant's motion to proceed in propria persona, the trial court should consider the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion. Therefore, in a prosecution for first degree murder and other offenses, the trial court did not abuse its discretion in denying defendant's motion to proceed in propria persona, where the motion was made after the jury had already been selected and was therefore not timely for purposes of having an absolute right of self-representation, and where the court noted that it had already taken four weeks to select the jury, that the reason for defendant's request seemed groundless, that defendant was receiving high quality representation, and that he had a proclivity to substitute counsel.

(3a-3e) **Criminal Law § 44—Rights of Accused—Fair Trial—Physical Restraints on Defendant; Jail Clothing—Discretion of Trial Court.**—A trial court must make the decision to use physical restraints on a case-by-case basis, and its determination, when made pursuant to a hearing outside the jury's presence, with the court making a due process determination regarding the necessity for the restraints on record, cannot be successfully challenged on review except on a showing of a manifest abuse of discretion. Therefore, on appeal of a conviction of first degree murder and other offenses, defendant's contention that the trial court abused its discretion in ordering him to be shackled during the trial was without merit, where the trial court held an in camera hearing, heard testimony by law enforcement officers and

the defendant, and made an on-the-record determination of the necessity for ordering defendant shackled.

(4a-4f) **Criminal Law § 658—Appellate Review—Harmless and Reversible Error—Evidence—Prior Conviction or Misconduct—Proof of Motive and Identity.**—In a prosecution for first degree murder and other offenses, the trial court erred in admitting three letters written by defendant approximately six years before the crimes in issue, while defendant was in prison for another crime. The letters, which were written to a superior court judge and the district attorney's office, expressed defendant's fear of prison and offered to provide information about crimes committed by others in exchange for release from prison. They were ruled admissible on the issue of motive and identity. However, the proffered motive of killing the victim, who allegedly witnessed defendant burglarizing her vehicle, based on defendant's extreme fear of prison, rested entirely on speculation and a tenuous chain of inferences. Nonetheless, it did not appear reasonably probable that the jury would have reached a more favorable result had the letters not been admitted, and therefore the error was not prejudicial, where, even without the letters the jury would have known of defendant's prior convictions of various crimes, and where there was strong circumstantial evidence of defendant's guilt.

(5a-5d) **Criminal Law § 311—Evidence of Other Crimes or Misconduct—Exceptions to Rule of Inadmissibility—To Prove Facts Material to People's Case.**—Evidence of a defendant's prior criminal acts is inadmissible under Evid. Code, § 1101, unless it is relevant to prove some fact, such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, other than defendant's disposition to commit such acts. The factual relevance, however, must pertain to some issue that is actually in dispute, and even then the trial court must exercise its discretion under Evid. Code, § 352, and exclude the evidence if its relevancy to prove the disputed fact is not of sufficient probative value to outweigh the manifest prejudice of such evidence.

(6a-6e) **Criminal Law § 375—Admissions and Declarations—Ambiguity of Statement.**—In a prosecution for first degree murder and other offenses, the trial court properly admitted in evidence a statement made by defendant to a deputy sheriff who was transporting defendant between jail and the courtroom. The deputy was tightening defendant's security chains, when defendant told the sheriff he could have his fun, and defendant would have his later. In response to the deputy's reply "I thought you already had your fun," defendant said: "Yeah, and I'll

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kill a lot more too, and you may be first on my list." The trial court properly determined that there was no interrogation of defendant by the deputy and also properly rejected defendant's assertion that the statement was too ambiguous to constitute an admission. Although defendant did not mention any specific victims, he did admit to having killed someone, and the statement required no speculation to connect it to the issue of whether defendant had killed the victim.

(7a-7e) **Criminal Law § 392—Admissibility—Documentary Evidence—Letters Written by Defendant Containing Threats to Witnesses and Others.**—On appeal of a conviction of first degree murder, defendant's contention that the trial court erred in admitting in evidence a letter written by him, in which he discussed the offer of another individual to "take out" his defense attorney, the prosecutor, and others if he lost the case, was without merit. In light of defendant's knowledge that authorities would copy and read his letter, defendant's mention of death threats, despite his stated reluctance to agree to them, constituted an attempt to intimidate the persons at whom the threats were directed. Moreover, defendant's contention that the trial court should have excluded the letter as more prejudicial than probative under Evid. Code, § 352, even though he never raised the claim at trial, was without merit. Defendant presented no pertinent authority to support his assertion that the trial court had a sua sponte duty to consider exclusion under § 352.

(8a-8e) **Criminal Law § 400—Admissibility—Demonstrative Evidence—Weapons and Instruments of Crime—Evidence Indicating Consciousness of Guilt.**—In a prosecution for first degree murder and other offenses, the trial court did not abuse its discretion in admitting in evidence a pruning type saw, a butcher knife, and two shanks of twine that defendant purchased after the murder of the victim. The trial court correctly determined that the probative value of the evidence was sufficient to warrant its admission, despite its potential prejudice. The evidence was relevant to show defendant's consciousness of guilt, in that the victim, whose ankles were bound, and whose wrists had been tied together, was decapitated and her hands cut off. These unusual factors also appeared to be closely related to the fact that defendant had threatened to kill his girlfriend to whom he had made incriminating statements, and who appeared to him to be a serious threat to his liberty as a witness.

(9a-9e) **Criminal Law § 55—Rights of Accused—Fair Trial—Confrontation by Witnesses—Unavailable Witness—Diligence in Locating Witness.**—In a prosecution for first degree murder and other offenses,

any error by the trial court in admitting the preliminary hearing testimony of a prosecution witness who had been cooperative but who had unexpectedly disappeared two weeks before trial, was clearly harmless beyond a reasonable doubt. The witness' testimony concerned the fact that defendant, who was using one of the victim's credit cards, ran out of the store at which the witness was employed before approval for a purchase could be given. The witness notified the police, and defendant was eventually arrested. The trial court found the prosecution had exercised due diligence in attempting to secure attendance of the witness, even though it had never used the Uniform Act to Secure Attendance of Witnesses. Since the witness could not be located after his disappearance, it would have been pointless to have used the uniform act. Moreover, the witness' preliminary hearing testimony was peripheral and could not have affected the verdict.

(10a-10d) **Homicide § 110—Appeal—Harmless and Reversible Error—Instructions—Felony Murder—Special Circumstances—Necessity of Intent.**—In a prosecution for first degree murder and other offenses, the trial court committed reversible error in failing to instruct the jury that in order to find true the special circumstances that the murder was commined while defendant was engaged in or was an accomplice in the commission of robbery, burglary, and kidnapping, it must find an intent to kill. The only theory on which the jury was instructed vis-à-vis the murder was felony murder, which does not require a finding of intent to kill, and the evidence did not establish intent to kill as a matter of law, where the coroner was unable to determine the cause of death or whether the victim's head and hands were cut off before or after death, where the one stab wound that was inflicted before death was nonfatal, and where it was possible that the victim might have been killed accidentally, with defendant deciding afterwards to mutilate the body in an attempt to prevent its identification.

[See **Cal.Jur.3d (Rev)**, Criminal Law, § 3343; **Am.Jur.2d**, Homicide, § 499.]

(11a-11c) **Homicide § 110—Appeal—Harmless and Reversible Error—Instructions—Failure to Instruct on Necessity for Intent to Kill in Felony-murder Special Circumstances.**—In a capital case involving felony-murder special circumstances, the trial court's error in instructing the jury so as to entirely remove the issue of intent from its consideration is reversible per se, unless the erroneous instruction was given in connection with an offense for which the defendant was acquitted, unless the defendant conceded the issue of intent, unless the factual question posed by the instruction was necessarily resolved ad-

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COUNSEL

Barry L. Morris, under appointment by the Supreme Court, for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Jay M. Bloom, John W. Carney and Pat Zaharopoulos, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

KAUS, J.*—Defendant Bernard Lee Hamilton was convicted of first degree murder, burglary, robbery and kidnapping (Pen. Code, §§ 187, 459, 211, 207).[1] Special circumstance allegations that the murder was committed while defendant was engaged in or was an accomplice in the commission of robbery (§ 190.2, subd. (a)(17)(i)), burglary (§ 190.2, subd. (a)(17)(vii)), and kidnapping (§ 190.2, subd. (a)(17)(ii))—all under the 1978 death penalty law—were found to be true. The jury fixed the punishment at death. The appeal is automatic. (Cal. Const., art. VI, § 11; § 1239, subd. (b).)

For reasons hereafter stated, we affirm the judgment of guilt, but set aside the special circumstance findings and reverse the penalty judgment.

I. FACTS

1. *Prosecution Case*

On May 31, 1979, about 1 p.m., the body of Eleanore Frances Buchanan was discovered in the grass near a cul-de-sac off Pine Valley Road, near San Diego. Harry Piper noticed it while walking back to his car from target shooting. The body had no head or hands and was clothed only in a bra, underpants and socks.

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

[1]Except as otherwise indicated, all statutory references are to the Penal Code.

The body appeared to be in full rigor mortis when a deputy sheriff arrived at the scene between 1:30 and 2 p.m. Two strings of white cord were tied around the ankles, and there were dark blue fibers sticking to some blood on the body. There were marks on the wrists indicating that they had been tied together. A search of the area revealed no clothing or anything else that could be associated with the victim.

Dr. Luibel, who performed the autopsy, was unable to determine the cause of death because of the absence of the head. (The head and hands have never been found.) He could, however, rule out natural causes. There were three long superficial incisions on the abdomen that appeared to have been inflicted after death. There was a horizontal stab wound on the abdomen that had probably been inflicted before death, but it did not penetrate the stomach or intestines. The right hand appeared to have been sawed off and the left one cut off with a knife. The head was probably removed by using both a knife and saw. Dr. Luibel could not say whether the victim was alive or dead when her head was cut off. The small amount of hemorrhage at the wrists suggested that the victim was probably dead when her hands were cut off. The body was still in full rigor mortis at 4 p.m. on May 31, 1979, when Dr. Luibel examined it. Death would have occurred about 16 hours before then—about midnight the night before.

Terry Buchanan, the victim's husband, testified that his wife had given birth to a baby boy three weeks before her death and that she was still nursing him on May 30, 1979. That day Mrs. Buchanan left the house about 6:30 p.m. to go to a math class at Mesa College from 7 to 10 p.m. She was wearing tan levis, a beige and brown T-shirt, and was carrying a brown simulated leather purse. Mrs. Buchanan drove the family's only vehicle—a new blue van. There was very little gas in the tank because Buchanan planned to have the tank replaced the next day. Since Buchanan used the van during the day for his dental supply sales work, the van contained dental equipment and supplies. Buchanan said his wife was very security conscious and customarily locked the van. He also said that everything in the van was in good condition when she left.

Mrs. Buchanan was last seen alive walking toward the parking lot from her math class about 9:30 p.m. Fellow students had given her copies of class notes for the classes she had missed because of the birth of her baby. Mrs. Buchanan had left class a little early because an optional quiz was given at 9:30 p.m.

At 1:52 a.m. (California time) on May 31, 1979, defendant called his girlfriend, Donna Hatch, in Terrell, Texas from his parents' home in San

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Diego. He told Donna that he had a van and was planning to leave for Texas as soon as the gas stations opened in the morning.

There was a gasoline shortage at the time, and gas stations were only open for limited hours. Between 4:45 a.m. and 10:15 a.m. on May 31, 1979, defendant used Terry and Eleanore Buchanan's Visa card to buy gas in El Cajon, California. The card was used two more times that day to buy gas for the van—once in El Centro, California at a station that was open between 6 a.m. and 10 a.m., and once in Tucson, Arizona.

When defendant arrived at Donna Hatch's home in Terrell, Texas on the evening of June 1, 1979, the van was dirty, had a broken arm on the driver's chair, a broken mirror, and a broken wing window on the passenger side. Defendant took Donna with him on errands in the van on June 1, 2 and 3, 1979. Donna saw some credit cards in the name of Terry and Eleanore Buchanan in the compartment between the seats. Defendant used the credit cards to buy gas and food while Donna was with him.

On June 3, while Donna was in the van with defendant and her daughter, they saw a highway patrolman. When Donna turned back to talk to her daughter, defendant told her not to make any sudden moves because they could get shot. Later, defendant stopped at a pay phone to call his brother and his friend Clifford. Donna heard defendant tell his brother he had flown to Texas. Clifford testified that when defendant called him, he was watching a report on TV that the body of a white woman with her head and hands cut off had been found; he told defendant about it. Defendant seemed nervous when he returned from talking to Clifford. He told Donna that he thought he had killed a man, but he did not want to tell her any details because she might not want to have anything to do with him if he told her. Defendant said he would let the van sit a while to see if anybody paid attention to it. He also said he needed some Texas license plates. He asked Donna to go with him to a car lot, but she refused.

Donna broke up with defendant the next day. Defendant said that if Donna were upset about the fact that he had lied about his ex-wife being dead, he would kill his ex-wife. On June 6, defendant called Donna to discuss bringing her back to California to testify for him in a pending case. At one point, a friend of Donna's got on the phone. Defendant told Donna, "I'm going to kill you and your friend, too. And you won't know when I'll be around because I don't have to be driving this van, I can be in another vehicle." Donna never saw or talked to defendant after that phone call.

Defendant continued using the Buchanans' credit cards to buy gas, food and other items. It was stipulated that on June 6 defendant charged a saw,

screwdriver and set of wrenches at a local store, and on June 7, he bought a butcher knife and two shanks of twine at a variety store.

While driving the van in Oklahoma on June 8, 1979, defendant was stopped by a deputy sheriff. The deputy ran a check of the van's VIN number and learned that it belonged to the homicide victim. Defendant was arrested and taken to jail. On the way to the jail he passed a poster offering a reward for David L. Wall, alias "Spider."

On June 9, 1979, San Diego sheriff's deputies interviewed defendant in Oklahoma. They began by introducing themselves, saying that they had come to talk to defendant about the van. Defendant interrupted them, stating: "Yeah, the guy told me yesterday, one that pulled the gun on me, that it had been involved in a homicide, and uh . . . ." Defendant was then advised of his *Miranda* rights, which he waived. Defendant told the deputies he had left San Diego in the van with Spider and Fran, a white woman who had left her husband for Spider. Spider's real name was Calvin Spencer. Fran and Spider were presently in Shreveport, Louisiana. They had given defendant the van and credit cards when he had said he did not want to stay in Louisiana. Defendant was shown a picture of Eleanore Buchanan with her baby. He said it looked like Fran, but Fran was a little skinnier.[2] Defendant said "the only time I seen her" Fran was wearing light colored jeans and carrying a beige nonleather purse.

Enroute to San Diego, defendant was disturbed about his arrest for murder and kept saying it was not going to stick because all the police had was a body they could not identify and a runaway wife.[3]

Shortly after defendant's preliminary hearing, Terry Buchanan received a letter with defendant's county jail return address. It said, "You are probably full of grief when you should be highly pissed-off . . ." because Fran was not dead but had left with Spider and was smoking Sherman Sticks. Buchanan turned the letter over to the district attorney's office.

Steven Thomas, an inmate at the San Diego County jail, testified that on January 24, 1980, he had a conversation with defendant about his case. He asked defendant, "Who are you trying to convince, Hamilton, me or yourself?" Defendant replied, "Well, I did it but they'll never prove it." Thomas reported the conversation to the guard. Thomas had been convicted of

[2]Fran was Eleanore Buchanan's nickname. It was on the school papers she had been carrying and on an unmailed birth announcement that had been in her purse.

[3]The body was, in fact, quickly identified by a number of distinctive features, which included moles, toenail polish, scars, recent episiotomy, and the nursing bra.

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murder, robbery, forgery, burglary and escape. Thomas testified he was in the federal witness protection program against organized crime, but had not received any money from the United States with respect to that program.

While transporting defendant between the jail and courtroom on August 21, 1979, Deputy Sheriff Parsons was tightening defendant's security chains. Defendant said, "All right, you have your fun, I'll have mine later." Parsons responded, "I thought you already had your fun." Defendant replied, "Yeah, and I'll kill a lot more, too, and you may be first on my list."

Brandon Armstrong, a criminalist, testified that the blue fibers that had been on the victim's body could easily have come from the carpet in the victim's van. Blood on the carpet in the van matched the type and characteristics of the victim. Several hairs found in the carpet stains could have been hers. Armstrong also examined blood found on defendant's shoe and concluded that it had been smeared on when wet. The blood on defendant's shoe was type O—the victim's type.[4] Defendant's type was A.

A questioned documents expert testified that defendant was the person who had signed Terry Buchanan's name to the credit card invoices.

2. *Defense Case*

Defendant's mother testified that he was at her house between 8 and 9 p.m. on May 30, 1979. She said that although she testified at the preliminary hearing that she did not remember seeing defendant on the evening of May 30, 1979, she later spoke to defendant who refreshed her recollection by reminding her of some things that had happened that evening.[5]

Mary Brewer, a relative of defendant's who lived in Oklahoma City testified that defendant had visited her in the early part of June 1979. He gave her a ride in the van, and she did not remember seeing any blood in it.

Defendant testified that he had never seen the victim alive or dead. He said he went to his sister-in-law's house after he left his parent's house about 9 p.m. on May 30, 1979. He saw the Buchanans' van parked on a street between 12:45 and 1 a.m. on May 31, 1979, while walking home

[4]Armstrong testified on rebuttal that the blood on defendant's shoe could not have come from rubbing against the blood on the van's carpet.

[5]Defendant had written two letters to Donna Hatch after her preliminary hearing testimony attempting to refresh her recollection as to events that involved her.

from a 7-Eleven store after talking to Butch McIntyre.[6] The keys were in the ignition, the wing window was broken, and a purse was on the passenger seat. Defendant drove the van home, called Donna Hatch, put his clothes in it and left for Texas shortly before sunrise. Defendant said he broke the armrest on the driver's seat when he was moving from the passenger seat to the driver's seat. (The seats were swivel chairs with armrests.)

Defendant explained that he had told the officers in Oklahoma that he had driven across the country with Spider and Fran because he did not want to get stuck with an auto theft charge.

Defendant denied having threatened to kill Donna Hatch. He said he bought the saw and other items on June 6 before he spoke to Donna Hatch. He planned to use them to burglarize a store in Terrell. Defendant said he was attempting to distract Donna when he told her he thought he had killed someone; she was angry at him because she had just found out he had lied about his ex-wife being dead.

David Faulkner, an entomologist, testified about an experiment he had conducted in an attempt to determine when the victim's body had been left at the cul-de-sac. Faulkner took a rabbit, with its head and forepaws severed, and at midnight put it where the victim had been found. The purpose was to determine the amount of insect activity that would occur. Faulkner testified that within a few hours of sunrise there were a lot of flies around the rabbit. Based on this experiment and his knowledge of the temperature on the morning of May 31, 1979, Faulkner concluded that the earliest the body would have been put there would have been about 9 a.m. Faulkner admitted, however, that there is a great deal of variation in the degree to which insects are attracted to different human bodies.

Parker Bell, a criminalist testified that the blood on defendant's shoe was a smear, as opposed to a droplet or splatter. He thought the blood could have come from the carpet, but he acknowledged that there were no blue fibers in the blood. (The blue carpet shed badly.) On cross-examination, however, Bell admitted it was possible that the blood could have been smeared on defendant's shoe by having bumped one of the victim's bloody stumps.

Dr. Ali Hameli, Chief Medical Examiner of the State of Delaware, testified that in his opinion the victim died between 9:30 and 12 p.m. on May 30. Dr. Hameli also thought that rigor mortis was present when the body

[6]McIntyre testified he saw defendant after watching the NBA game on TV. There had, however, been no game on May 30. There had been one on May 29, 1979.

was placed at the cul-de-sac and that the body could have been put there no earlier than 4 a.m. on May 31.

Allen Biggs testified that he had been at the cul-de-sac about 10 a.m. on May 31, 1979. He had seen Mr. Piper's car but no body. Deputy Sheriff Crawford testified that tire tracks at the scene in the cul-de-sac did not match the tire tracks of the victim's van.[7]

II. Guilt Phase

1. *Faretta Motions*

(1a), (2a) Defendant contends that he was improperly denied his constitutional right to represent himself on two occasions. **(1b)** The first motion was made during a section 1538.5/995 hearing, which began on March 24, 1980, and ended on May 21, 1980. At that time trial was set for June 23, 1980. On April 25, defendant's appointed counsel, Thomas Ryan and Vivian Camberg, requested a continuance of the hearing in order to appear before the presiding judge and ask to be relieved. The court expressed some frustration about the delays caused by defendant's difficulties with counsel and noted that defendant had just appeared before the presiding judge and been denied his request to have counsel relieved. The court nevertheless granted the continuance, and the presiding judge heard and denied counsel's motion. Defendant then renewed his motion to relieve counsel, which was also denied.

On May 1, defendant filed a motion to relieve counsel and to proceed in pro. per. At the hearing on the motion on May 9, defendant decided to withdraw his pro. per. motion and instead requested that he be given co-counsel status. The request was granted. On May 20, however, at the time scheduled for resumption of the section 1538.5/995 hearing, defendant requested to have his counsel relieved and new counsel appointed. Defendant stated that if that motion were denied, he would then renew his motion to proceed in pro. per. The court listened to defendant's complaints about counsel and counsel's response and denied the motion to relieve counsel. It also denied the motion to proceed in pro. per. "on the 995," noting that the court was in the middle of a hearing that had begun two months earlier and had already produced several days of testimony. The court cited defendant's inadequate knowledge of the legal principles involved. Before ruling on the motion, the court noted the great difficulty there would be in

[7]Crawford had testified for the prosecution and had identified photos that showed drag marks from the roadway to where the body had been found. The drag marks appeared to start on the pavement.

finding any other lawyer to come in at this stage of the proceedings. The prosecutor objected to any further delays and urged the court to proceed, noting that he had witnesses scheduled to appear.

No error appears in the trial court's denial of defendant's motion to proceed in pro. per. In *People* v. *Windham* (1977) 19 Cal.3d 121 [137 Cal.Rptr. 8, 137 P.2d 1187], we held that unless such a motion is made within a reasonable time before commencement of trial, it does not invoke the constitutionally mandated unconditional right of self-representation, but puts the matter within the court's discretion. The motion here was untimely within the context of this protracted section 1538.5/995 hearing. Accordingly, the court properly exercised its discretion under *Windham* in denying the motion on the ground that defendant had not stated a valid reason for relieving counsel and was grasping at anything to delay the proceedings. The fact that the court may also have referred to defendant's lack of legal ability—an irrelevant consideration under *Faretta*—does not detract from the validity of its other reasons for denying the motion.

(2b) On October 14, 1980, defendant filed another written motion to proceed in pro. per. On October 20, however, he requested that his motion be taken off calendar, stating that he wanted to keep trying to get along with counsel and that he did not think that pro. per. status was the answer to his problems.[8] Defendant revived his motion on November 3, alleging inadequate representation by counsel. At that time, however, the jury had been selected and counsel were ready to give their opening statements. The court held an ex parte in camera session to hear and discuss defendant's complaints about counsel: Counsel's failure to keep him informed of discovery, counsel's decision to have a de novo section 1538.5 hearing, lack of communication, and inadequate investigation. Counsel responded with apparently satisfactory explanations on all counts.

After more than one and a half hours of discussion about defendant's difficulties with counsel, the court had the prosecutor join the proceedings and indicated that it was going to deny the motion to relieve counsel. The court stated that the reasons for defendant's request seemed groundless. It felt that defendant would be unable to adequately represent himself; he would have difficulty in communicating due to his soft voice, and he did not have sufficient objectivity to cope with examining witnesses and address-

[8]The problems he referred to were his continual dissatisfaction with counsel's strategic decisions, asserted difficulty in communicating with counsel, and counsel's alleged failure to keep him informed of all discovery. Defendant stated these complaints on a number of occasions, and the record is replete with discussions between the court, defendant and his counsel about their problems. Defendant was constantly second-guessing counsel on strategic decisions.

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ing the court. The court noted that defendant was receiving high-quality representation and had a proclivity to substitute counsel. It further noted that it had already tak.. four weeks to select the jury. Defendant reminded the court that he was not asking for a continuance.

This motion, too, was properly denied under *Windham*. Since the jury had already been selected at the time defendant revived his motion, it was not timely for purposes of having an absolute right of self-representation under *Faretta* v. *California* (1975) 422 U.S. 806 [45 L.Ed.2d 562, 95 S.Ct. 2525]. (See *People* v. *Harris* (1977) 73 Cal.App.3d 76 [140 Cal.Rptr. 697] [motion made after jury selection underway]; *People* v. *Hall* (1978) 87 Cal.App.3d 125 [150 Cal.Rptr. 628] [motion made right before jury selection]; *People* v. *Hill* (1983) 148 Cal.App.3d 744 [196 Cal.Rptr. 382] [motion made at beginning of trial before jury selection].) The fact that defendant did not ask for a continuance is not determinative. (See *People* v. *Hill*, *supra*, 148 Cal.App.3d 744.) *Windham* lists a number of factors for the court to consider in exercising its discretion: "the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion." (19 Cal.3d at p. 128.) The court considered those factors and acted within its discretion in denying defendant's request. Again, the court's reference to impermissible factors—such as defendant's lack of legal knowledge and his soft voice—does not invalidate the rest of its reasoning.

2. *Shackling*

(3a) On September 18, 1980, before the trial started, defendant appeared with his counsel at an in camera hearing to discuss whether he should be shackled at trial. Counsel reported to the court that defendant had attacked his assistant 10 days earlier while she was meeting with defendant in a jail holding cell. Then, on the night before the hearing, defendant had punched counsel in the mouth while he was visiting defendant in jail. Counsel stated he had no doubts about defendant's mental competency and that he thought defendant was merely "acting out" as a result of his frustration. Counsel, however, believed that defendant would continue such behavior and feared its effect on the jury if such outbursts occurred at trial. He therefore requested that defendant be shackled during trial in order to avoid the possibility of the extreme prejudice that would result from the anticipated outbursts. Defendant objected to shackling and reminded the court that he had never caused a problem in his previous court appearances. Although the court did not rule on the issue of shackling at that time, defendant appeared

at later pretrial hearings in shackles, apparently as a result of a security decision made by the sheriff's department.

On September 24, still before trial, defendant and counsel appeared at another in camera hearing. At this hearing, which was basically held to consider defendant's motion to proceed in pro. per., defendant requested removal of the shackles (particularly those on his arms) to enable him to handle his papers and to take notes. Counsel, however, requested that the shackles remain on during the argument. He reiterated his position that he felt it was in defendant's best interests to be shackled from the beginning of trial rather than take the chance of the extreme prejudice resulting from an outburst at trial and the midtrial appearance of shackles. Defendant again objected, citing the discomfort and inconvenience of shackles and the fact that he had never caused a problem in his many other court appearances in this case.

On October 2, before jury selection was to begin, another in camera hearing was held at defense counsel's request. Counsel stated that he had reconsidered the matter after discussions with defendant and with other attorneys. He now felt that defendant should be allowed to start trial without shackles. Counsel said he believed that defendant intended to behave at trial and noted that defendant had not disrupted any proceedings in the past. After hearing from defendant and checking with jail authorities, the court concluded that defendant should be unshackled but that he would still have to wear a knee brace which would not be visible to the jury. Jury selection began later that day.

At the next court session on October 6, defendant complained about the discomfort of the knee brace. The court took the matter under submission and concluded later that day that defendant should start trial without any restraints.

On October 8, however, while jury selection was still in progress, the court held another in camera hearing on the question of shackling. A sheriff's deputy was sworn as a witness and related an incident that had happened at the jail that morning: Defendant was reminded at 6, 7:20 and 7:40 a.m. that he was to go to court and should get ready. Defendant was still in bed when the deputies arrived to take him to court. When they removed his blanket, defendant jumped up and took a fighting stance. He was subdued, but he continued to struggle and be uncooperative as he was being moved from jail. Ultimately the deputies had to drag him part way. Defendant called the deputies cowards and asked them to remove the chains and fight him "one on one." Another deputy testified that while at the holding cell, defendant again became abusive and proceeded to remove all

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of his clothes. He came to court wrapped in a blanket. Defense counsel cross-examined the deputies, and defendant gave his version of the incident.

After argument by defense counsel against shackling and by the prosecutor for shackling, the court concluded that defendant should be shackled. It cited the pattern of increased agitation by defendant despite its efforts to accommodate defendant's problems with jail routine: "'Mr. Hamilton has obtained the privileges over and above those privileges granted to other prisoners in the jail. He has a private cell, private telephone, he is able to work on his case, being co-counsel in the case. He has chosen to defy orders that have been made by officers in the jail. He has refused to dress to come to court. He is coming into court with jail garb and apparently a blanket thrown over his body and one shoe on and one shoe off, apparently. He has defied all authority and I think it is just a matter of time before he would begin to defy all authority here in the courtroom. I am going to take the steps that are necessary to make certain that doesn't happen. I am going to require that he be in chains, his ankles and hands, for the trial. I regret the necessity to do it. I regret that Mr. Hamilton brought this upon himself. But I find no alternative. I am not going to subject anybody in this courtroom to any possible injury or violent confrontation. This case is going to be tried in an orderly and a quiet and judicial manner.'"

Defendant contends the court abused its discretion in ordering him to be shackled during trial because there was no showing of manifest need. In *People* v. *Duran* (1976) 16 Cal.3d 282 [127 Cal.Rptr. 618, 545 P.2d 1322, 90 A.L.R.3d 1], we held that the court had abused its discretion in ordering a defendant shackled without a showing on the record of a manifest need for such restraints: "There is no showing that defendant threatened to escape or behaved violently before coming to court or while in court." (*Id.*, at p. 293.) We noted that a trial court must make the decision to use physical restraints on a case-by-case basis and that such a determination, when made in accordance with the procedures specified (hearing outside jury's presence with court making due process determination regarding necessity for restraints of record), "cannot be successfully challenged on review except on a showing of a manifest abuse of discretion." (*Id.*, at p. 293, fn. 12.)

No abuse of discretion is shown here. The trial court followed the dictates of *Duran:* it held a hearing, heard testimony by the deputies and by defendant, and made an on-the-record determination of the necessity for ordering defendant shackled. The fact that defendant had made numerous earlier appearances without disruption does not dispel the present threat that the court found based on defendant's current actions. Defendant's reliance on *People* v. *Jackle* (1978) 77 Cal.App.3d 878 [144 Cal.Rptr. 23], is misplaced for

the decision there was not based on the judge's independent determination of the need to shackle or on the defendant's conduct while in custody.

Defendant's complaints about the court's earlier decision to shackle him based on his counsel's request are no longer pertinent since counsel changed his mind before trial and the court acceded to counsel's plea for removal of the shackles. Although fault might be found with counsel's reasoning in requesting shackling in the first instance—that is, to saddle defendant with the certainty of prejudice from appearing before the jury in shackles in order to avoid the *possibility* of prejudice from an outburst at trial—the matter became moot before trial ever commenced. Defendant's complaints about the procedure employed in those earlier hearings on shackling are also moot.

3. *Evidentiary Issues*

a. *Exhibits 91, 92, 93*

(4a) Defendant contends the trial court prejudicially erred in admitting three letters he wrote in 1973 while in prison (exhibits 91, 92, 93). Two of the letters were written to a superior court judge asking him to reconsider the prison sentence he had imposed, and offering, in return for such condition, to provide information about crimes committed by others. The third letter was to the district attorney's office pleading for release from prison in exchange for providing information about recent crimes. In this letter defendant listed a number of alleged crimes and purported perpetrators, including his own brother.[9]

The People sought to introduce these letters and evidence of a 1972 burglary of a van at Mesa College on the issue of identity. The People's theory was that Eleanore Buchanan interrupted defendant while he was breaking into her van. The reason that he killed her rather than just running off—as

[9]Exhibit 91 asked the judge to consider reducing defendant's sentence to county time. Defendant mentioned his cooperation with a police officer in solving "robberies, burglaries, drugs as well as firearms." Defendant said he had been threatened because of it and was afraid to come out of his cell.
Exhibit 92 again asked the judge to reconsider his prison sentence, again mentioned his help to the police and fear from threats made against him. Defendant stated: "Sir, I want to say this, there are a lot of crimes I've seen and know about where they involve instances of dangering people's lives and where people have committed bodily harm to people. I also know the big drug dealers. I know of several arsons of firearms and I'm willing to prove I'm still trying to turn straight, by giving this information to the police department."
Exhibit 93 asked the district attorney to help him get released on special probation in return for providing information about crimes. It listed about 33 crimes (robbery, burglary, drug offenses) committed in the Kearny Mesa area and the persons responsible. This list includes robberies and burglaries committed by defendant's brother.

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a normal burglar would have done—was defendant's deathly fear of returning to prison. Defendant had been sent to prison in 1973 after two eyewitnesses to the 1972 burglary had testified against him. Defendant's letters revealed that he was terrified of prison and indicated the lengths to which he would go—turning in his own brother—to avoid prison.

The defense objected, asserting that the letters actually showed only defendant's criminal disposition and in any event should be excluded under Evidence Code section 352.[10] As to the 1972 burglary, the defense contended that there were insufficient distinctive similarities between it and the present crime to warrant an inference that they were committed by the same person.

The trial court ruled that the 1972 burglary would not be admitted because it did not share sufficiently distinctive common marks with the current crime. The three letters, however, were ruled admissible on the issue of motive and identity. The court suggested that counsel meet and try to agree on excising portions of the letters that may be irrelevant. Counsel, however, were unable to agree on excising anything more than the names of the judges and district attorney to whom the letters were addressed and the details of the burglary conviction. Defense counsel wanted the details of defendant's information about other crimes excised, but the court agreed with the prosecutor that these details were necessary to demonstrate the severity of defendant's fear of prison and the lengths to which he would go to avoid prison.

(5a) Evidence of a defendant's prior criminal acts is, of course, inadmissible under Evidence Code section 1101 unless it is "relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident) other than his disposition to commit such acts." (Evid. Code, § 1101, subd. (b).) The factual relevance, however, must pertain to some issue that is "actually in dispute," and even then the court must exercise its discretion under Evidence Code section 352 and exclude the evidence if its relevancy to prove the disputed fact is not of sufficient probative value to outweigh the manifest prejudice of such evidence. (*People* v. *Thompson* (1980) 27 Cal.3d 303, 314-321 [165 Cal.Rptr. 289, 611 P.2d 883].)

[10]These issues were raised during a pretrial hearing. It is not clear whether the trial court was aware that the only murder theory the People would later assert was felony murder. The matter was not mentioned by either side at the hearing. Defendant now argues that since only felony murder was used, there was no issue as to intent. He does not state whether the trial court was aware of that fact at the time of its pretrial ruling. In any event, the court's ruling was based on the relevance of the letters to show motive and identity.

(4b) Defendant challenges the admissibility of the evidence at every level of analysis. He asserts that it did not tend to show a motive and that even if it did, the motive was not material to any disputed issue. He points out that there was no issue of intent since the only theory of murder presented was felony murder, which requires no finding of intent to kill. He notes that most of the cases which have allowed motive evidence have involved an issue of intent. (See, e.g., *People* v. *Robillard* (1960) 55 Cal.2d 88 [10 Cal.Rptr. 167, 358 P.2d 295, 83 A.L.R.2d 1086]; *People* v. *Durham* (1969) 70 Cal.2d 171 [74 Cal.Rptr. 262, 449 P.2d 198]; *People* v. *Powell* (1974) 40 Cal.App.3d 107 [115 Cal.Rptr. 109]; *People* v. *Vidaurri* (1980) 103 Cal.App.3d 450 [163 Cal.Rptr. 57].)

Defendant relies heavily on *People* v. *Alcala* (1984) 36 Cal.3d 604 [205 Cal.Rptr. 775, 685 P.2d 1126], where we found the admission of evidence of prior child molestation offenses by the defendant to have been reversible error. The evidence was not admissible on the issue of identity because there were no sufficiently distinctive similarities between the charged and uncharged crimes to warrant an inference of having been committed by the same person. We also held that the evidence was not admissible to establish a motive for premeditated murder on the ground that the defendant's prior crimes increased his incentive to eliminate the victim as a witness since the prior convictions would aggravate the penalty for the current offense. We refused to adopt such reasoning because it would mean that "one's criminal past could always be introduced against him." (*Id.*, at p. 635.) We distinguished *Durham* and *Robillard* on the ground that the motive of escape was central in those cases where the defendants shot and killed police officers during routine automobile stops.

We agree that it was error to admit these letters. The proffered motive of killing eyewitnesses because of defendant's extreme fear of prison simply does not wash. It rests entirely on speculation on how an assumed "normal" burglar would have behaved after being discovered, which, in turn, is based entirely on speculation on how such a "normal" burglar would have weighed the possibility of going to prison against the problems associated with the taking of a human life. The jury is then asked to compare this supposed reaction of a "normal" burglar with the assumed reaction of a person who dislikes prison with the intensity which the defendant's letters imply. It is difficult to imagine a more tenuous chain of inferences on which to base a finding that one person has killed another.

We cannot, however, say that the error in admitting the evidence was prejudicial. At worst the letters showed defendant's prison connection and his knowledge of crime life in San Diego, but they were not in the same league of prejudice as the evidence of molestations in *Alcala*. Even without

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the letters, we still would have known that defendant had been convicted of forgery in 1972 and burglary in 1973 and that he had a felony case pending when he went to Texas.[11] There is also strong circumstantial evidence of defendant's guilt. In addition to his admission to a jailer and a jailhouse informant, we have defendant driving the victim's van and using her credit cards. We also have a spot of blood on defendant's shoe that is the victim's blood type but not defendant's.

Defendant's admitted fabrication of the "Fran and Spider" story and his explanation for its retraction furnish almost unanswerable evidence of consciousness of guilt with respect to the very victim of the homicide, as well as contact with her.

First, with respect to the explanation: at the outset of the Oklahoma interview defendant had been told that the van had been involved in a homicide. Making up a provably false story just to avoid being accused of having stolen the van, seems extravagant.

More important, however, is the fact that defendant was not told anything about the victim of the homicide. Yet his admittedly false story attempted to account for the whereabouts of the actual victim whose body, as defendant believed, could not be identified. Further, once it was conceded that the "Fran and Spider" story was a lie, defendant's ability to identify the victim from the picture showing her with her baby, as well as his correct description of her clothes and purse, prove some kind of contact with her. Conversely, none of the defense evidence—except defendant's bare denials—was conclusively inconsistent with the People's case.

Under the circumstances, it does not appear reasonably probable that the jury would have reached a more favorable result had these letters not been admitted. (*People* v. *Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243].)

b. *Statement to Deputy Parsons*

(6a) Defendant contends the trial court prejudicially erred in admitting evidence of the statement defendant made to Deputy Sheriff Parsons: "Yeah, and I'll kill a lot more, too, and you may be first on my list."

[11]Donna Hasch's testimony referred to the fact that there was such a case pending against defendant when he went to Texas; it will be recalled that he wanted her to testify for him. Defendant's 1972 forgery and 1973 burglary convictions were ruled admissible for impeachment purposes under *People* v. *Beagle* (1972) 6 Cal.3d 441 [99 Cal.Rptr. 313, 492 P.2d 1] and were so used.

It seems quite clear that defendant's decision to testify was not compelled by the erroneous admission of these letters. There was far more damaging evidence that defendant needed to explain if he were to have any chance of acquittal—the fabricated story about Fran and Spider, his statements and threats to Donna Hasch, and his possession of the victim's van.

Before Deputy Parsons' testimony in front of the jury, an in camera hearing was held on the admissibility of the statement. Counsel objected on the grounds that the statement was solicited by the deputy in violation of *Massiah* and *Miranda*, that it was ambiguous and did not constitute a threat or admission. The court ruled that there had been no interrogation by Deputy Parsons and that the statement was admissible as an admission. Defense counsel then sought to have the last portion excluded—the statement "you may be first on my list." The court denied the request on the ground that the entire statement was needed to show its essence.

Defendant does not challenge the court's finding of no interrogation. He contends only that the statement was too ambiguous to constitute an admission. The trial court properly rejected defendant's contention. Even though no Evidence Code section 352 objection was raised, the court would not have abused its discretion in admitting the evidence over such an objection. Although defendant did not mention any specific victims, he did admit to having killed someone. Defendant's reliance on *People* v. *Allen* (1976) 65 Cal.App.3d 426 [135 Cal.Rptr. 276] is misplaced because the statement there required too many levels of speculation to be construed as an admission *of guilt*.[13] The statement here, by contrast, required no speculation to connect it to the issue of whether defendant had killed Mrs. Buchanan.

c. Letter to Theresa Roch

(7a) Defendant contends that the trial court prejudicially erred in admitting a letter—not previously mentioned—written by him to Theresa Roch. He claims that there was no evidence to show that he had authorized the threat to witnesses referred to in the letter. During argument on the admissibility of the letter, defense counsel conceded that a foundation had been laid and stated that he would have no objection to the letter being received into evidence if the portion referring to the threats were excised. That portion read: "By the way, today I got news from Quack. He says he knows I am innocent but also knows how I will get railroaded, so if I lose

[13]In *Allen*, the defendant was charged with the theft of jewelry that was missing after he had spent the night with the victim. The defendant had awakened the victim during the night and told her that someone had been in the apartment and that he had chased the intruder out. Over the defendant's objection, the victim testified that defendant had stated he had ways of finding out where the stolen jewelry was if anyone attempted to sell it, and that he made a phone call in which he stated that he wanted to be informed if the jewelry was sold. The testimony was admitted on the theory that such statements constituted an implied admission that the defendant and a confederate had stolen the jewelry, but, after second thoughts, were attempting to return it to the victim.

The Court of Appeal held the statements were improperly admitted as an implied admission of defendant that he had stolen the jewelry because any inference to that effect was too speculative and unreasonable to meet the test of relevance. (*People* v. *Allen*, *supra*, 65 Cal.App.3d at pp. 433-435.)

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this case, they will take out O'Connor [defense attorney], Sexton [prosecutor], McArdle [prosecutor] and Armstrong [criminalist], and at least one member of their family. [¶] I don't like the idea of violence, since I have never been a violent person, and the proposal seeks my agreement. I haven't sent answers as of yet, because I have to consider a lot of things before I do. [¶] I don't like the idea, but I also don't like the idea of sitting on someone's murder charge, so that leaves me a lot to think about. Anyway, time has finally slowed down, but now, there is a lot going on."

The prosecutor asserted that the letter was relevant to show an attempt to intimidate the prosecutors and the criminalist. He noted that defendant had mentioned in an earlier letter to Terry Buchanan that he knew the authorities were copying his mail. In light of this knowledge, the mention of the threat—despite defendant's stated reluctance to agree to it—constituted an attempt to intimidate the persons mentioned. The court apparently agreed and admitted the letter.

Defendant relies on *People* v. *Hannon* (1977) 19 Cal.3d 588 [138 Cal.Rptr. 885, 564 P.2d 1203] and *People* v. *Weiss* (1958) 50 Cal.2d 535 [327 P.2d 527] in asserting that the letter should not have been admitted in the absence of evidence indicating that he had authorized the threats by "Quack." Defendant misunderstands the basis on which the letter was admitted. It was the fact that defendant knew that his letter would be copied and read by the authorities that transformed the reference to threats by "Quack" into a subtle attempt at intimidation by defendant.

Defendant also asserts that the court should have excluded the letter under Evidence Code section 352 even though that claim was never raised at trial. He presents no pertinent authority in support of the assertion that the trial court had a sua sponte duty to consider exclusion under section 352.

d. Admission of Saw, Knife and Twine

(8a) Defendant contends the court prejudicially erred in admitting a saw (pruning type), butcher knife and two shanks of twine that he had bought in Texas on June 6 and 7, after the murder of Mrs. Buchanan. At the hearing on the admissibility of the items, defense counsel argued that they were only marginally relevant to defendant's threats to kill Donna Hatch and that it would be impossible for the jury to limit its consideration to their relevance to threats against Hatch.

The prosecutor argued that the evidence had two purposes. The first was a narrow one of showing defendant's consciousness of guilt in that defendant bought these items to use in killing Donna Hatch, who, after their fall-

ing-out, had become a serious threat as a witness because of the incriminating things defendant had said to her. Defendant's consciousness of guilt was also shown by the fact that when questioned after his arrest, he denied any connection with the saw, claiming "Spider must have bought it."

The larger purpose of the evidence was to show defendant's identity as the killer of Mrs. Buchanan. The items, which inferably were to be used in killing Donna Hatch, were similar to the tools used on Mrs. Buchanan—dead or alive.

The court acknowledged the potential prejudice but concluded that the probative value of the evidence was sufficient to warrant its admission in light of the unusual factors of the cutting off of the victim's head and hands: "The circumstances are about as unique and different as any case that I have ever seen, and there are certain earmarks of the case that seem to be closely related with the possibility that the defendant may have intended to do something along the same lines to some other person who was standing in his way; that is, who was a threat to him as far as his liberty was concerned, and it is so unusual that it seems to be a circumstance which might well show a consciousness on the part of the defendant of his guilt . . . ."

The cases on which defendant relies are distinguishable from the present situation in that they involved the admission of weapons found in the defendant's possession that could not have been the ones used in the crime and were not admitted for any other relevant purpose. (*People* v. *Riser* (1956) 47 Cal.2d 566 [305 P.2d 1]; *People* v. *Henderson* (1976) 58 Cal.App.3d 349 [129 Cal.Rptr. 844].) No abuse of discretion appears in the court's ruling here.

e. *Preliminary Hearing Testimony of Steve Terry*

(9a) Defendant contends he was denied his right of confrontation by the use of one Steve Terry's preliminary hearing testimony at trial. Terry was an employee of Stuckey's in Oklahoma where defendant had used one of the victim's credit cards. He had testified that defendant ran out of the store before approval for the credit card purchase could be obtained. Terry notified the police and gave a description of defendant and the vehicle. It was this call that ultimately led to defendant's arrest.

Terry had been a cooperative witness. The district attorney's investigator had been in regular touch with him and had served him with a subpoena by mail. His last contact with Terry was July 15, 1980, when he advised Terry that the August 12, 1980, trial date had been continued. The investigator learned two weeks before trial that Terry was no longer employed by the

Stuckey Corporation, that he and his wife had separated and that he had left the town of Marietta, Oklahoma. An Oklahoma sheriff's department employee testified that she had attempted unsuccessfully to locate Terry. She had checked with the post office, the electric company and had attempted to contact Terry's wife's parents.

Defendant contends the trial court erred in finding that the prosecution had exercised due diligence since it never used the Uniform Act to Secure Attendance of Witnesses. He relies on *People* v. *Blackwood* (1983) 138 Cal.App.3d 939 [188 Cal.Rptr. 359], where the Court of Appeal held that the trial court had erred in finding a witness unavailable when the prosecution had made vigorous efforts to find the witness but had not attempted to use the uniform act.

The present situation is distinguishable from that in *Blackwood* where the witness had been located but refused to cut short an Alaskan vacation to appear at trial. In *Blackwood*, the prosecutors had made no effort to use the uniform act to obtain interstate process because they thought it unlikely that Alaska would have issued a subpoena because of the undue hardship on the witness. Here, by contrast, the prosecution had a cooperative witness who unexpectedly disappeared two weeks before trial. (Cf. *People* v. *Masters* (1982) 134 Cal.App.3d 509 [185 Cal.Rptr. 134] [prosecution unjustified in relying on uncooperative witness's promise to appear].) Since Terry could not be located after his unexpected disappearance, it would have been pointless to have used the uniform act. (See *Ohio* v. *Roberts* (1979) 448 U.S. 56 [65 L.Ed.2d 597, 100 S.Ct. 2531].)

In any event, any error in admitting Terry's preliminary hearing testimony was clearly harmless beyond a reasonable doubt. (See *People* v. *Blackwood*, *supra*, 138 Cal.App.3d at p. 947.) Terry's testimony was peripheral and could not have affected the verdict.

4. *Special Circumstance Findings*

(10a) Defendant contends that the special circumstance findings must be set aside and the penalty reversed for the court's error under *Carlos* v. *Superior Court* (1983) 35 Cal.3d 131 [197 Cal.Rptr. 79, 672 P.2d 862], in failing to instruct on the necessity for intent to kill in the felony-murder special circumstances. We agree. **(11a)** In *People* v. *Garcia* (1984) 36 Cal.3d 539 [205 Cal.Rptr. 265, 684 P.2d 826], we held *Carlos* error reversible per se with four limited exceptions: (1) if the erroneous instruction was given in connection with an offense for which the defendant was acquitted; (2) if the defendant conceded the issue of intent; (3) if the factual question posed by the instruction was necessarily resolved adversely to the

defendant under other, properly given instructions, (4) where the evidence establishes intent to kill as a matter of law and shows no evidence to the contrary that is worthy of consideration. (*Id.*, at pp. 554-556.)

(10b) In this case the only theory of murder on which the jury was instructed was felony murder which, of course, does not require a finding of intent to kill. Thus the only potentially relevant exception to the *Garcia* rule of automatic reversal is the fourth—the so-called *Thornton-Cantrell* exception. The evidence does not support its application here. As noted, the coroner was unable to determine the cause of death or whether the victim's head and hands were cut off before or after death. The one stab wound that had been inflicted before death was nonfatal. Although the evidence would arguably support a finding of intent to kill had proper instructions been given, it manifestly does not establish intent to kill as a matter of law. The victim might have been killed accidentally, with defendant deciding afterwards to mutilate the body in an attempt to prevent identification.[13] We simply do not have enough evidence as to the circumstances of the victim's death to be able to conclude that intent to kill was established as a matter of law.

III. Disposition

The findings of special circumstances are set aside and the judgment is reversed insofar as it relates to penalty; in all other respects the judgment is affirmed.

Broussard, J., and Reynoso, J., concurred.

GRODIN, J.—(1c), (2c), (3b), (4c), (5b-9b), (10c), (11b) I agree that the principles this court adopted in *People* v. *Garcia* (1984) 36 Cal.3d 539 [205 Cal.Rptr. 265, 684 P.2d 826], which were in turn based on federal constitutional principles, compel reversal of the special circumstances finding for *Carlos* error, and I therefore concur.

Justice Lucas' dissent is appealing.[1] However the killing occurred, the circumstances were certainly brutal, and from the record on review I agree

[13]The fact that the victim's wrists and ankles had been tied does not alter this; death could have occurred accidentally while she was tied up.

[1]Part of what I say here is applicable also to the concurring and dissenting opinion by Justice Mosk. Justice Mosk accepts both *Carlos* and *Garcia*, but would affirm the judgment on the ground that intent to kill was "manifest from the facts and no evidence was introduced by defendant that might raise a reasonable doubt on that issue." He makes no attempt, however, to explain how this conclusion fits within the analytical framework of *Garcia*. (See discussion, *post*, pp. 435-436; compare *People* v. *Anderson* (1985) 38 Cal.3d 58, 61-62 [210 Cal.Rptr. 777, 694 P.2d 1149].)

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that had the question of intent been put to the jury it is unlikely that its verdict would have been otherwise. From that perspective, the dissent's suggestion that the judgment does not represent a "miscarriage of justice" within the meaning of the California Constitution (art. VI, § 13) may well have merit.

But there are several flaws in the dissent's analysis. The first is its failure to recognize that *Garcia* is premised squarely on principles of *federal* constitutional law as declared by the United States Supreme Court in *Connecticut* v. *Johnson* (1983) 460 U.S. 73 [74 L.Ed.2d 823, 103 S.Ct. 969]. As we observed in *Garcia*, *Connecticut* v. *Johnson* reveals that "at least eight justices of the United States Supreme Court . . . agree that a jury instruction which does take an issue completely from the jury is reversible per se. We have no doubt that they would reach the same conclusion if the error was one of omission—failing to submit the issue of intent to the jury. Both forms of error have the same effect: removing the issue wholly from jury determination, and thus denying defendant the right to jury trial on the element of the charge." (*People* v. *Garcia*, *supra*, 36 Cal.3d at p. 554.) *Garcia* concluded that *Carlos* error is reversible per se subject to four familiar exceptions, one of which (the so-called *Cantrell-Thornton* exception) was not based upon any language in *Connecticut* v. *Johnson* but was, we thought, compatible with the principles announced in that case.

The Attorney General sought review of this court's decision in *Garcia* by petition for certiorari to the United States Supreme Court, but review was denied. (469 U.S. 1229 [84 L.Ed.2d 366, 105 S.Ct. 1229].) Subsequently, the high court granted review in *Engle* v. *Koehler* (6th Cir. 1983), a case involving the test of prejudice for *Sandstrom* error (*Sandstrom* v. *Montana* (1979) 442 U.S. 510 [61 L.Ed.2d 39, 99 S.Ct. 2450] [in which the jury was instructed that "[t]he law presumed that a person intends the ordinary consequences of his voluntary acts"]), but the appeal in that case was summarily affirmed by an equally divided court. (*Koehler* v. *Engle* (1984) 466 U.S. 1 [80 L.Ed.2d 1, 104 S.Ct. 1673].) The high court has since avoided the same issue in *Francis* v. *Franklin* (1985) 471 U.S. 307, 325 [85 L.Ed.2d 344, 360, 105 S.Ct. 1965, 1977], and has declined to grant certiorari in another case posing the *Sandstrom-Connecticut* v. *Johnson* prejudice issue. (See *Davis* v. *Kemp* (11th Cir. 1985) 752 F.2d 1515, cert. den., 471 U.S. 1143 [86 L.Ed.2d 706, 105 S.Ct. 2689], and White, J., dis. at pp. 1144-1145 [86 L.Ed.2d at pp. 707-708, 105 S.Ct. at pp. 2690-2691.) Thus, if this court was wrong in *Garcia*, the Supreme Court has yet to say so.

Nor, for that matter, do I believe we can take guidance in our *Carlos-Garcia* cases from the federal circuit courts' treatment of *Sandstrom-Con-*

necticut v. *Johnson* error.[2] Although the reasoning of those cases is not always consistent, the above-cited courts often have affirmed in the face of *Sandstrom-Connecticut* v. *Johnson* error upon finding that (i) the defendant actually or impliedly "conceded" the issue of intent by putting on a particular defense and thereby failing to put his mens rea in issue and (ii) that the record establishes the defendant's intent "overwhelmingly." Although these cases suggest an appealing solution to *Sandstrom-Connecticut* v. *Johnson* error, I must conclude they do not assist our *Carlos-Garcia* analysis for two reasons.

First, it is not clear to me that the federal circuit court cases give due consideration to what we emphasized in *Garcia*—the effect of an evidentiary void created by the very instructional error in question. (36 Cal.3d at p. 556.) Specifically, none of the federal cases explain why it is permissible to consider whether the record establishes the defendant's intent when, by the instructions given, the defendant had little (if any) incentive to put on such evidence if he had it. Therefore, I am not convinced that the United States Supreme Court would endorse the course taken by the federal circuit courts in *Sandstrom-Connecticut* v. *Johnson* error cases. As noted, the high court has yet to rule on the issue.

Second, even assuming the federal circuit courts are correct in their implicit holdings that a *Sandstrom-Connecticut* v. *Johnson* defendant can be deemed to have had some incentive to put on lack-of-intent evidence (and therefore an appellate court may properly review the record as it exists to determine whether intent is proved "overwhelmingly"), I strongly question whether the same incentive to produce such evidence can be deemed to have

[2]A number of pre-*Connecticut* v. *Johnson* cases addressed the prejudice issue. See, e.g., the 11 cases discussed in *Connecticut* v. *Johnson*, *supra*, 460 U.S. 73, 75, footnote 1 [74 L.Ed.2d 823, 826]. Post-*Connecticut* v. *Johnson* cases include: *Engle* v. *Koehler* (6th Cir. 1983) 707 F.2d 241 (reversing; defendant claimed diminished capacity), affirmed by an equally divided court, 466 U.S. 1 [80 L.Ed.2d 1, 104 S.Ct. 1673] (mem.); *Franklin* v. *Francis* (11th Cir. 1983) 720 F.2d 1206 (reversing; defendant claimed diminished capacity), affirmed, 471 U.S. 307 [85 L.Ed.2d 344, 345, 105 S.Ct. 1965, 1977] (declining to rule on the standard of prejudice); *Penton of Hamilton* (9th Cir. 1983) 721 F.2d 1189 (reversing; defendant claimed self-defense and diminished capacity); *Fulton* v. *Warden, Md. Penitentiary* (4th Cir. 1984) 744 F.2d 1026 (affirming; defendant claimed alibi); *Davis* v. *Kemp* (11th Cir. 1985) 752 F.2d 1515 (en banc) (affirming; defendant claimed noninvolvement), certiorari denied, 471 U.S. 1143 [86 L.Ed.2d 706, 105 S.Ct. 2689]; *McCleskey* v. *Kemp* (11th Cir. 1985) 753 F.2d 877 (affirming; defendant claimed alibi); *Brooks* v. *Kemp* (11th Cir. 985) 762 F.2d 1383 (en banc) (reversing; defendant claimed noninvolvement and accident); *Tucker* v. *Kemp* (11th Cir. 1985) 762 F.2d 1496 (en banc) (affirming; defendant claimed noninvolvement); *Hagler* v. *Callahan* (9th Cir. 1985) 764 F.2d 711 (affirming; defendant claimed alibi); *Church* v. *Kincheloe* (9th Cir. 1985) 767 F.2d 639 (affirming; defendant claimed mistake of fact); *Bowen* v. *Kemp* (11th Cir. 1985) 769 F.2d 672 (affirming although defendant claimed insanity). See also *Guyton* v. *LaFevre* (S.D.N.Y. 1983) 560 F.Supp. 1237 (affirming; defendant claimed alibi).

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existed in *Carlos-Garcia* cases. The difference between the two situations is significant. Jurors in *Sandstrom-Connecticut* v. *Johnson* error cases have been erroneously instructed in a variety of ways, but they have essentially been left with the impression that, although intent needed to be proved, the defendant's acts conclusively proved his intent, or that it was the defendant's burden to disprove his intent. In such a situation an appellate court might reasonably conclude that a defendant, knowing that such an instruction on intent would be given, nevertheless had a significant incentive to put on lack-of-intent evidence, if any he had. Jurors in *Carlos-Garcia* cases, on the other hand, have been given instructions that omit intent to kill as an element of a special circumstance. In this situation an appellate court cannot (except perhaps in rare situations) reasonably conclude that a defendant, knowing instructions omitting intent as an element would be given, nevertheless had an incentive to put on lack-of-intent evidence he may have had. With this latter proposition, even the *Connecticut* v. *Johnson* dissenting justices agree: As Justice Powell stated for three of his colleagues, an instruction that removes the issue of intent from the jury's consideration *precludes* an appellate court from determining whether the error was harmless. (460 U.S. at pp. 95-96 [74 L.Ed.2d at pp. 839-840, 103 S.Ct. at pp. 982-983].)

The dissent in the present case, purporting to apply *Garcia* analysis, advances a dual approach for avoiding reversal: (1) on the record as it stands, intent to kill is clear; and (2) we can be satisfied that even if defendant had been aware that intent was an issue in the special circumstances phase of his trial the record would have been no more favorable to him on that point. The first aspect of the dissent's argument is adequately treated in the majority's opinion; I focus here on the second.

The dissent argues that although intent to kill was not relevant during the guilt phase, defendant had a strong incentive to present evidence showing lack of intent at the penalty phase, and because he did not do so we may safely assume no such evidence exists.

The dissent makes no attempt to fit this argument into the *Garcia* framework of analysis. I assume that if it were to fit anywhere, it would be within the *Cantrell-Thornton* exception. But that exception requires, as a threshold matter, that the parties have "recognized" intent as an issue, and "presented all evidence at their command on that issue." (*People* v. *Garcia*, *supra*, 36 Cal.3d at p. 556.) Obviously, defendant did not "recognize" intent to be an issue at the special circumstances phase since, under the court's instructions, it was plainly not. I gather what the dissent is suggesting is that the "intent recognized" requirement of the *Cantrell-Thornton* exception should be deemed met on the basis that defendant had an incen-

tive, at the penalty phase, to present evidence bearing on lack of intent in mitigation so that the evidentiary void on this subject in fact represented "all the evidence at [his] command."

Perhaps there are cases in which the incentive to come forward with evidence bearing on intent at the penalty phase is so clear that it may be said with positive assurance that the defendant, properly represented, would have done so, but such a conclusion entails the assumption that competent counsel would have had no tactical reason to withhold such evidence had it been available. I do not believe we can make that assumption here. Here, as in many cases, defendant had every reason at the penalty phase to attempt to turn the jury's attention away from the facts of the underlying crime and direct it instead towards his family background and positive relationships and conduct. Even if he had evidence which—if introduced at the special circumstance stage—might have raised a reasonable doubt on the intent to kill issue, his counsel might well have concluded that, since no finding of intent to kill beyond a reasonable doubt was required at the penalty phase, little would be gained by redirecting the jury's focus at that point towards defendant's conduct which resulted in the victim's death. Reopening the facts of the crime may well have detracted from defense counsel's effort to have the jury conduct an overview of his life in determining whether he should live or die. Thus, the absence of evidence in this regard at the penalty phase does not demonstrate that there is no such evidence that could have been presented.[3]

Perhaps the United States Supreme Court will grant certiorari in this or another case and tell us we were wrong in *Garcia*, but until it does our obligation is to apply the law as we find it. I concur in the judgment.

BIRD, C. J.—(1d), (2d), (3c), (4d), (5c-9c), (10d), (11c) I concur fully in Justice Kaus's fine opinion.

Since the special circumstance findings and penalty judgment must be reversed as a result of the trial court's error under *Carlos* v. *Superior Court* (1983) 35 Cal.3d 131 [197 Cal.Rptr. 79, 672 P.2d 862], the majority correctly decline to note the existence of other special circumstance or penalty phase issues which might require reversal of those verdicts.

[3] I would be prepared to depart from rigid application of the "intent recognized" requirement and affirm on the record as it stands, were it inconceivable that any reasonable juror would have found the defendant lacked intent to kill, no matter what evidence (other than evidence of diminished capacity) he might have produced on that issue. In such a case I would affirm the penalty verdict contingent on defendant's right to present diminished capacity evidence, if any he has, in a habeas corpus proceeding. Again, this is not such a case.

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In this case, the trial court gave the so-called "Briggs commutation instruction" that this court has held invalid on state due process grounds in *People* v. *Ramos* (1984) 37 Cal.3d 136 [207 Cal.Rptr. 800, 689 P.2d 430]. In addition, the trial court failed to exercise its discretion to strike the special circumstance findings under *People* v. *Williams* (1980) 30 Cal.3d 470 [179 Cal.Rptr. 443, 637 P.2d 1029]. Since these issues might require reversal, the final vote in this case does not reflect the views of the justices on these errors.

LUCAS, J., Concurring and Dissenting.—(1e), (2e), (3d), (4e), (5c), (6d-9d) I concur in the majority opinion to the extent it affirms defendant's conviction of first degree murder, burglary, robbery and kidnapping. I respectfully dissent, however, to the setting aside of the special circumstances finding and penalty judgment.

The majority relies upon *People* v. *Garcia* (1984) 36 Cal.3d 539 [205 Cal.Rptr. 265, 684 P.2d 826], and *Carlos* v. *Superior Court* (1983) 35 Cal.3d 131 [197 Cal.Rptr. 79, 672 P.2d 862], in concluding that the failure to instruct the jury regarding intent to kill was prejudicial error requiring us to set aside the special circumstances finding and the penalty judgment. For reasons I have previously explained, I strongly disagree with the holdings in those cases (see *People* v. *Whitt* (1984) 36 Cal.3d 724, 749 [205 Cal.Rptr. 810, 685 P.2d 1161] [dis. opn.]), and I can no longer concur in judgments which reverse special circumstances findings under their compulsion (see *People* v. *Guerra* (1985) 40 Cal.3d 377, 389 [220 Cal.Rptr. 374, 708 P.2d 1252] [dis opn.]).

The concurring opinion by Justice Grodin reluctantly agrees that *Carlos*/*Garcia* principles apply here. He attempts to place responsibility for those cases upon the shoulders of the United States Supreme Court and its fragmented decision in *Connecticut* v. *Johnson* (1983) 460 U.S. 73 [74 L.Ed.2d 823, 103 S.Ct. 969], a case which appears to impose a per se reversal rule whenever the issue of intent is *improperly* removed from the jury's consideration. I have no quarrel with that case, whatever principle may be gleaned from the various opinions written therein. My principal quarrel is with *Carlos* itself, wherein my colleagues rewrote Penal Code section 190.2, subdivision (a)(17), and introduced an "intent to kill" requirement which was mandated by neither state nor federal law. (See *Carlos* v. *Superior Court*, *supra*, 35 Cal.3d 131, 156-159 [dis. opn. by Richardson, J.].) As we proceed to reverse one death penalty judgment after another on *Carlos* grounds, let us not assign the blame to some other court—the fault is ours. I continue to urge reconsideration and disapproval of that unfortunate decision.

But even were *Carlos* considered "good law," it does not require setting aside the special circumstances finding in this case. Here, defendant's intent

to kill was established as a matter of law, and no contrary evidence was introduced which might raise a possible doubt on the issue.

As the majority acknowledges, defendant's victim was stripped to her underwear, bound hand and foot, repeatedly stabbed, partially dismembered and finally decapitated. At least one stab wound, to the stomach, probably occurred prior to her death. The majority postulates, however, that "The victim might have been killed accidentally, with defendant deciding afterwards to mutilate the body in an attempt to prevent identification. [Fn. omitted.] We simply do not have enough evidence as to the circumstances of the victim's death to be able to conclude that intent to kill was established as a matter of law." (*Ante*, p. 432.)

To the contrary, I suggest that the condition of Mrs. Buchanan's body amply established an intent to kill in the absence of *any* evidence in the record supporting the majority's accidental death theory. We cannot reverse a judgment, even a death penalty judgment, based on nothing more than mere speculation or surmise. (See Cal. Const., art. VI, § 13 [requiring a "miscarriage of justice"].)

It is simply inconceivable that, if the killing were indeed "accidental," defendant would have neglected to attempt to prove that fact. Although lack of intent to kill was not relevant during the guilt phase, it would have been a strong mitigating factor at the *penalty* phase of the trial. (See Pen. Code, § 190.3, subds. (a) [circumstances of the crime], (d) [extreme mental or emotional disturbance], (f) [reasonable belief killing was justified], (g) [extreme duress], (h) [impaired capacity to appreciate criminality of conduct or conform to law], and (k) [any other extenuating circumstance].) Yet, defendant's penalty phase evidence was limited to general character and background evidence, and pleas by defendant's friends and relatives to spare his life. Can there be any reasonable doubt whatever that defendant would have presented evidence bearing on his lack of intent to kill had there been any such evidence to present?[1]

My colleagues continue to reverse capital cases on *Carlos/Garcia* grounds, despite the fact that in many of these cases it is readily apparent that the defendant possessed the requisite intent to kill, and that a failure to instruct on that issue was, at worst, harmless error.

[1]Justice Grodin, in his concurring opinion, speculates that trial counsel may have had a tactical reason for failing to raise potentially mitigating evidence regarding defendant's lack of intent to kill. Any such "tactics" would border upon incompetence in light of the absence of any other significant mitigating evidence presented at the penalty phase. I believe we should assume the more logical explanation—that no such evidence existed—and reserve to defendant his right to contradict their assumption in a habeas corpus proceeding.

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I would affirm the judgment in its entirety.

MOSK, J.—(1f), (2f), (3e), (4f), (5d), (6e-9e) I concur in the majority opinion to the extent it affirms defendant's conviction of first degree murder, burglary, robbery and kidnapping, but I dissent to the setting aside of the special circumstances finding and the penalty.

I cannot join in Justice Lucas' criticism of *Carlos* v. *Superior Court* (1983) 35 Cal.3d 131 [197 Cal.Rptr. 79, 672 P.2d 862]. Even if one be disillusioned by the number of penalty reversals required by that decision and by *People* v. *Garcia* (1984) 36 Cal.3d 539 [205 Cal.Rptr. 265, 684 P.2d 826], stare decisis and respect for the judicial process require adherence to decisions rendered so recently by a substantial majority of this court. A petition for certiorari in the United States Supreme Court was sought by the Attorney General in *Garcia*, and review in the high court was denied. (469 U.S. 1229 [84 L.Ed.2d 366, 105 S.Ct. 1229].) Thus *Carlos-Garcia* remains the law in California.

I agree with Justice Lucas, however, that even under *Carlos*, we need not set aside the special circumstance finding in this case. Intent to kill was manifest from the facts and no evidence was introduced by defendant that might raise a reasonable doubt on that issue.

Therefore I would affirm the judgment in its entirety.

Respondent's petition for a rehearing was denied March 13, 1986. Lucas, J., and Panelli, J., were of the opinion that the petition should be granted.

APPENDIX 2

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Former § 190.2 was repealed by § 5 of Initiative Measure approved Nov. 7, 1978.

Former § 190.3, added by Stats.1973, c. 719, § 5, relating to similar subject matter, was repealed by Stats.1977, c. 316, § 6.

Cross References

Assault by life prisoner, offense punishable by death, see § 4500.
Death penalty, not deemed cruel or unusual punishment, see Const. Art. I, § 27.
Execution of death penalty, see § 3600 et seq.
Judgment of death,
Appellate jurisdiction of Supreme Court, see Const. Art. 6, § 11.
Delivery of commitment to sheriff, see § 1217.
Opinion of justices of Supreme Court, see § 1219.
Statement of reasons, see § 1218.

§ 190.25. Life imprisonment without parole; transportation personnel; accomplices

(a) The penalty for a defendant found guilty of murder in the first degree shall be confinement in state prison for a term of life without the possibility of parole in any case in which any of the following special circumstances has been charged and specially found under Section 190.4, to be true: the victim was the operator or driver of a bus, taxicab, streetcar, cable car, trackless trolley, or other motor vehicle operated on land, including a vehicle operated on stationary rails or on a track or rail suspended in the air, used for the transportation of persons for hire, or the victim was a station agent or ticket agent for the entity providing such transportation, who, while engaged in the course of the performance of his or her duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was the operator or driver of a bus, taxicab, streetcar, cable car, trackless trolley, or other motor vehicle operated on land, including a vehicle operated on stationary rails or on a track or rail suspended in the air, used for the transportation of persons for hire, or was a station agent or ticket agent for the entity providing such transportation, engaged in the performance of his or her duties.

(b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.

(c) Nothing in this section shall be construed to prohibit the charging or finding of any special circumstance pursuant to Sections 190.1, 190.2, 190.3, 190.4, and 190.5. *(Added by Stats. 1982, c. 172, § 1.)*

§ 190.3. Death penalty or life imprisonment; determination by trier; evidence of aggravating and mitigating circumstances; factors

If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code or Sections 37, 128, 219 or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole. *(Added by § 8 of Initiative Measure approved Nov. 7, 1978.)*

Former § 190.3 was repealed by § 7 of Initiative Measure approved Nov. 7, 1978.

Former § 190.3, added by Stats.1973, c. 719, § 6, prohibiting death penalty in certain circumstances, was repealed by Stats.1977, c. 316, § 10. See, also, § 190.5.

Cross References

Burden of proving mitigating circumstances in trial for murder, see § 1105.

Death penalty, not deemed cruel or unusual punishment, see Const. Art. I, § 27.

Treason, admissibility of evidence of overt act, see § 1102.7.

§ 190.4. Special circumstances; special findings; penalty hearing; application for modification

(a) Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to Subdivision (b) of Section 190.1.

In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that it is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Whenever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people.

If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, there shall be a separate penalty hearing, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of a separate penalty hearing.

In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach a unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by a unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and in the court's discretion shall either order a new jury impaneled to try the issues the previous jury was unable to reach the unanimous verdict on, or impose a punishment of confinement in state prison for a term of 25 years.

(b) If defendant was convicted by the court sitting without a jury the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.

If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or

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impose a punishment of confinement in state prison for a term of life without the possibility of parole.

(c) If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to Section 1026, the truth of any special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.

(d) In any case in which the defendant may be subject to the death penalty, evidence presented at any prior phase of the trial, including any proceeding under a plea of not guilty by reason of insanity pursuant to Section 1026 shall be considered at any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes. The denial of the modification of the death penalty verdict pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the People's appeal pursuant to paragraph (6) of subdivision (a) of § 1238 *(Added by § 10 of Initiative Measure approved Nov. 7, 1978.)*

Former § 190.4 was repealed by § 9 of Initiative Measure approved Nov. 7, 1978.

Cross References

Burden of proving mitigating circumstances in trial for murder, see § 1105.

Treason, admissibility of evidence of overt act, see § 1102.7.

§ 190.5. Death penalty; exclusion of persons under 18; proof

Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who is under the age of 18 at the time of the commission of the crime. The burden of proof as to the age of such person shall be upon the defendant. *(Added by § 12 of Initiative Measure approved Nov. 7, 1978.)*

Former § 190.5 was repealed by § 11 of Initiative Measure approved Nov. 7, 1978.

Former § 190.5 was repealed by Stats.1976, c. 139, § 350.4

§ 190.6. Legislative finding; limitations

The Legislature finds that the imposition of sentence in all capital cases should be expeditiously carried out.

Therefore, in all cases in which a sentence of death has been imposed, the appeal to the State Supreme Court must be decided and an opinion reaching the merits must be filed within 150 days of certification of the entire record by the sentencing court. In any case in which this time requirement is not met, the Chief Justice of the Supreme Court shall state on the record the extraordinary and compelling circumstances causing the delay and the facts supporting these circumstances. A failure to comply with the time requirements of this section shall not be grounds for precluding the ultimate imposition of the death penalty. *(Added by Stats.1977, c. 316, § 14.)*

§ 190.7. Entire record; contents; preparation and certification of record on appeal

The "entire record" referred to in Section 190.6 shall include, but not be limited to, the following:

(a) The normal and additional record prescribed in the rules adopted by the Judicial Council pertaining to an appeal taken by the defendant from a judgment of conviction.

(b) A copy of any other paper or record on file or lodged with the superior court and a transcript of any other oral proceeding reported in the superior court pertaining to the trial of the cause.

Nothing contained in this section shall preclude a court from ordering that the entire record include municipal court or settlement proceedings pertaining to the case.

Notwithstanding this section, the Judicial Council may adopt rules, not inconsistent with the purpose of Section 190.6, specifically pertaining to the content, preparation and certification of the record on appeal when a judgment of death has been pronounced. *(Added by Stats. 1982, c. 917, § 1.)*

§ 190.8. Death penalty; expeditious certification of record on appeal

In any case in which a death sentence has been imposed, the record on appeal shall be expeditiously certified. If the record has not been certified within 60 days of the date it is delivered to the parties or their counsel, the trial court shall monitor the preparation of the record monthly to expedite certification and report the status of the record to the California Supreme Court.

Corrections to the record shall not be required to include simple typographical errors that cannot conceivably cause confusion. *(Added by Stats.1984, c. 1422, § 1.)*

No. 88 5746

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BERNARD LEE HAMILTON, *Petitioner*

vs.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*

Petition for Writ of Certiorari
to the Supreme Court of California

PETITIONER'S REPLY BRIEF

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I

PETITIONER WAS PREJUDICED WHEN THE CALIFORNIA SUPREME COURT IGNORED THE LIMITED SCOPE OF THIS COURT'S REMAND FOR FURTHER CONSIDERATION IN LIGHT OF *ROSE V. CLARK*, SET ASIDE ITS PREVIOUS REVERSAL OF THE SPECIAL CIRCUMSTANCE FINDINGS IN PETITIONER'S CASE, AND AFFIRMED THE IMPOSITION OF THE DEATH PENALTY

In its reply to the petition for writ of certiorari, respondent apparently concedes that California Supreme Court was wrong in its assertion that this Court's remand for further consideration in light of *Rose v. Clark* (1986) 478 U.S. 570 rendered that court's decision in *People v. Hamilton* (1985) 41 Cal.3d 408 (hereinafter, *Hamilton I*) a "nullity." Instead, respondent rather lamely claims that petitioner suffered no prejudice when the California Supreme Court ignored the limited scope of this Court's remand and, instead, reconsidered the special circumstance findings made in appellant's case. Respondent claims that,

> "The reconsideration resulted in no change. Any error in considering the guilt phase again was potentially beneficial to petitioner. Consequently, no right of his was infringed in that he got a free second review of his convictions." (R.B. 11)

As Winston Churchill once said, "the exact opposite of the truth has never been stated with greater precision."

In its decision in *Hamilton I*, the California Supreme Court **reversed** the special circumstance findings that made petitioner death eligible, **set aside** the sentence of death, and ordered a new trial on the special circumstance issue. Following this Court's remand, in *People v. Hamilton* (1988) 45 Cal.3d 351 (hereinafter, *Hamilton II*), the California Supreme Court **affirmed** the special circumstance findings and **affirmed** petitioner's death sentence. It requires no citation of authority to assert that petitioner was prejudiced by the improper response of the California Supreme Court to this Court's remand.

Moreover, respondent's assertion that, "in view of the fact that all guilt phase issues had been affirmed[1]...petitioner got another bite

[1] This statement is not true. There are only two "phases" of a capital trial under California law. In the first "phase", the so-called "guilt phase," the jury resolves the question of whether or not the defendant is guilty of first degree murder, and if so, are there special circumstances attendant to the commission of the murder that would make defendant death eligible. If the jury finds the special circumstance allegations to be true, the "guilt phase" is followed by a "penalty phase." In *Hamilton I*, the California Supreme Court affirmed the finding of first degree murder, but **reversed** the special circumstance findings. Thus it is not accurate to state that, "all guilt phase issues had been affirmed."

at the apple" when the California Supreme Court reconsidered guilt phase issues[2] gives new meaning to the word "disingenuous." Following this Court's remand, both petitioner and respondent received a letter from the California Supreme Court requesting briefing,

> "on the effect, if any, of *Cabana v. Bullock* (1986) __U.S. __[106 S.C.t. 689], and *Rose v. Clark* (1986) __U.S.__ [54 U.S.L. Week 5023] on the above entitled case." (See Appendix)

Subsequently, both petitioner and respondent filed a series of briefs with and argued twice before the California Supreme Court. **Not once**, either in briefing or in argument, did petitioner, respondent, or the California court even mention, let alone discuss at any length, any guilt phase issues other than the impact of *Rose, supra* and *Cabana, supra*, on the California court's decision in *Hamilton I*.

Conclusion

Respondent concedes that this Court's remand did not render the California Supreme Court's decision in *Hamilton I* a nullity, but argues instead that petitioner was not prejudiced by the subsequent action of that court in *Hamilton II*. In fact, petitioner was prejudiced about as much as one can be; his sentence of death was reinstated.

The California Supreme Court misinterpreted this Court's remand, "for further consideration in light of *Rose v. Clark*." Given the obscurity of the leading decision of this Court explaining the meaning of such an order, the per curiam decision in *Henry v. City of*

[2] The only reference to other guilt phase issues in *Hamilton II* opinion is the following:

> "Pursuant to the mandate of the United States Supreme Court...we have reexamined that part of our former opinion dealing with the issues relating to guilt...Inasmuch as we deem it unnecessary to alter or amend our prior decision in that regard, we adopt it as our decision in this proceeding." 45 Cal.3d 351, 363

Rock Hill (1964) 376 U.S. 776,[3] given the ultimate prejudice suffered by petitioner as a result of the California Supreme Court's misinterpretation of that order, this Court should grant certiorari, not only to correct the manifest injustice done to petitioner, but to clearly explain the significance of an order remanding a case for further consideration in light of an intervening precedent of this Court.

[3] As noted in the petition for certiorari, that case has been cited only three times by lower courts in the twenty four years following that decision. (Pet. p.7)

II

PETITIONER'S REQUEST TO PERSONALLY PLEAD FOR HIS OWN LIFE AS HIS OWN LAWYER WAS UNCONDITIONAL, WAS TIMELY MADE, AND THE TRIAL COURT'S DENIAL OF THAT MOTION DEPRIVED PETITIONER OF HIS SIXTH AMENDMENT RIGHT TO REPRESENT HIMSELF

A.

Petitioner's January 6th Motion to Represent Himself was not Conditional.

On the very day that the verdict of guilty was returned by the jury, petitioner moved that, "the Court relieve counsel or in the alternative permit defendant to represent himself." (C.T. 1202) Respondent claims that this was merely "conditional" request which it seems to equate with "equivocal" request. Not so. As the Second Circuit observed in *Johnstone v. Kelly* (2nd Cir. 1986) 808 F.2d 214, 215, n.2

> "A request to proceed *pro se* not equivocal merely because it is an alternative position, advanced as a fall-back to a primary request for different counsel. *See Faretta v. California, supra,* 422 U.S. at 810 n.5, 835-36, 95 S.Ct. at 2529 n.5 *United States v. Denno* 348 F.2d 12, 14 n. 1, 16 (2d Cir. 1965), *cert. denied* 384 U.S. 10007, 86 S.Ct. 1950, 16 L.Ed.2d 1020 (1966)"

B.

Petitioner's Motion to Represent Himself was Timely.

Petitioner made his motion to represent himself at the penalty trial as soon as he became aware of the fact that there would be such a trial. The motion was made weeks before the penalty phase was set to begin. Respondent says that this motion to proceed *pro se* was untimely under California decisional law and asserts, without benefit of relevant citation, that the question of the timeliness of the assertion of the Sixth Amendment right to represent oneself at the penalty phase of a capital trial "is properly left to state law." (R.B. 14)

On the contrary, historically, this Court has jealously guarded federal constitutional rights from encroachment by state laws and

decisions that frustrate the exercise of those rights. As this Court observed in *Chapman v. California* (1967) 386 U.S. 18, 21

> "Whether a conviction for crime should stand when a State has failed to accord federally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied. With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules and remedies designed to protect people from infractions by States of federally guaranteed rights."

See also *Green v. Georgia* (1979) 442 U.S. 95 Moreover, in analyzing the timeliness of the request to proceed *pro se*, the California court is not free to disregard this Court's holding in *Bullington v. Missouri* (1981) 451 U.S. 430, 437 that the penalty phase is, "itself a trial on the issue of punishment..." and substitute its own judgment, that it is merely, "a stage in a unitary capital trial." *Hamilton II*, 45 Cal.3d at 351

What if the California court had held that an assertion of the right to proceed *pro se* was untimely unless asserted at arraignment? Would this Court be required to defer to that evisceration of the Sixth Amendment right to proceed *pro se* because "timeliness" was a matter of state law?

C.

Petitioner's Conduct in Court was Never Disruptive

Respondent suggests that the denial of petitioner's motion to proceed *pro se* was in some way justified by his conduct during the trial. Nothing could be further from the truth. Throughout the four months of trial that preceded the guilty verdict, his behavior in court was exemplary; there was not a single improper outburst of any sort from petitioner.[4]

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[4] The reference to, "attack[ing] people in the court process at the jail" referred to an altercation that petitioner got involved in with jailers at the very beginning of the trial. Such conduct was not repeated and never spilled into the court proceedings.

The reference to "threatened to disrupt the court proceedings by attacking his attorneys or even the judge" also came at the very beginning of the trial and in his recitation to the trial court of what petitioner told assistant counsel, petitioner's lead counsel commented, "there is some dispute over whether or not Mr. Hamilton meant that at the time or it was a means that he was using to impress upon her his dislike for Miss Camberg and myself at that time..." (72 R.T. 32)

True, he did voiced complaints about his attorneys to the trial court, but he always did so at the appropriate time in an appropriate manner.

True, prior to arraignment in Superior Court, the magistrate deemed it proper to make substitutions of appointed counsel, but it would be circular reasoning of the worst sort to conclude that, because petitioner was disatisfied with his appointed counsel and the magistrate found sufficient merit to his complaints to warrant their substitution, petitioner in any way compromised his Sixth Amendment right to represent himself.

Conclusion

When the question before a jury is one of life or death, the right to represent oneself is at least as fundamental as it is when the question is one of guilt or innocence. The state should not be allowed to frustrate the assertion of that right following a guilty verdict in a capital case by interposing an objection of timeliness. This Court should grant certiorari to resolve this basic and important question of constitutional law.

III

THE INSTRUCTIONS OF THE TRIAL COURT COUPLED WITH THE PROSECUTION'S VOIR DIRE AND CLOSING ARGUMENT MISLED THE JURY CONCERNING THE CAPITAL PENALTY DETERMINATION IT HAD TO MAKE BY INFORMING THE JURY THAT THEY HAD NO CHOICE BUT TO VOTE FOR THE DEATH PENALTY IF THE FACTORS IN AGGRAVATION OUTWEIGHED THOSE IN MITIGATION EVEN IF, UNDER THOSE CIRCUMSTANCES, THE JURORS STILL FELT THAT DEATH WAS NOT THE APPROPRIATE PUNISHMENT

Respondent contends that, based upon the explanation of the law given in petitioner's case it was,

> "not possible for the jury to conclude the aggravating circumstances technically outweighed the mitigating yet it must return a death verdict even if it believed the lesser sentence was appropriate." (R.B. 17)

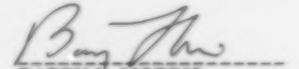
Respondent is wrong. A juror may well have concluded that even though the aggravating factors outweighed those in mitigation on a relative scale, on an absolute scale, the preponderance of aggravating factors did not justify imposition of the death penalty. For example, in a case where there was no evidence presented in mitigation, and some, but not very substantial, evidence presented in aggravation, even assuming that the jurors understood that were free to assign whatever weight they deemed appropriate to those factors, and even assuming that the jurors understood that they were to weigh and not merely count the factors on each side, a conscientious juror might well conclude that even though the evidence in aggravation outweighed that in mitigation, death was not the appropriate punishment. Yet if that same juror listened to and followed the law as stated in voir dire, instructions, and argument, that same juror would conclude that, according to the law as given to them in petitioner's case, a death sentence was his or her only option.

Moreover, respondent conveniently ignores the promises extracted by the prosecutor from the jurors in appellant's case during voir dire. Eleven out of twelve jurors if were told that aggravation outweighed mitigation, they would have no choice but to impose the death penalty. They were then asked if they would

promise to do that if that was the state of the evidence; when asked, they promised.

Clearly, the statutory scheme in California as applied in petitioner's case did not, "permit the type of individualized consideration of mitigating factors...required by the Eight and Fourteenth Amendments in capital cases. *Lockett v. Ohio* ((1978) 438 U.S. 586, 605

Dated: November 18, 1988



BARRY J. MORRIS
Attorney for Petitioner
BERNARD LEE HAMILTON

Appendix

OFFICE OF THE CLERK

Supreme Court of California

SAN FRANCISCO, CALIFORNIA

LAURENCE P. GILL, CLERK

July 25, 1986

Barry L. Morris, Esq.
370 Grand Avenue
Oakland, CA 94610

Pat Zaharopoulos
Deputy Attorney General
110 West "A" Street
San Diego, CA 92101

Re: Crim. 21958 - People v. Bernard Lee Hamilton

Dear Counsel:

The court requests briefing on the effect, if any, of Cabana v. Bullock (1986) ___ U.S. ___ [106 S.Ct. 689], and Rose v. Clark (1986) ___ U.S. ___ [54 U.S.L. Week 5023] on the above-entitled case. Simultaneous briefs are to be served and filed by August 14, 1986. Briefs in letter form will be acceptable.

Very truly yours,

LAURENCE P. GILL
Clerk of the Supreme Court

LPG:ew

cc: Herbert F. Wilkinson, Supervising Deputy Attorney General
California Appellate Project
Rec.
Reg.

PROOF OF SERVICE BY MAIL

Petitioner's reply brief

I, Barry L. Morris, declare that I am a citizen of the United States of America, over the age of 18 years; my business address and place of business is 580 Grand Avenue, Oakland, California, 94610; and I am not party to the within action. On the date shown below, I deposited a true copy of the above-entitled document(s) in the mail in the City of Oaklan placing said document(s) in a sealed envelope with postage thereon full prepaid and addressed as follows:

Ms. Pat Zaharopolous
Office of the Attorney General
110 A Street
San Diego, California 92101

Clerk, California Supreme Court
4250 State Building
San Francisco, California 94102

Clerk, Superior Court
San Diego County
220 West Broadway
San Diego, California 92101

Executed on November 21, 1988 at Oakland, California

I declare under penalty of perjury that the foregoing is true and correct.

SUPREME COURT OF THE UNITED STATES

BERNARD LEE HAMILTON *v.* CALIFORNIA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 88–5746. Decided January 23, 1989

The petition for a writ of certiorari is denied.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting from denial of certiorari.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant certiorari and vacate the death sentence in this case. Even if I did not hold this view, however, I would grant the petition to resolve the question whether a trial court may instruct a penalty phase jury that, "if you conclude that the aggravating circumstances outweigh the mitigating circumstances, you *shall* impose a sentence of death." I have grave doubts that such an instruction permits the individualized and reliable sentencing determination that the Constitution requires in capital cases, particularly where, as here, it is coupled with prosecutorial remarks stressing the limits on jurors' discretion.

Petitioner Bernard Lee Hamilton was charged with first-degree murder, kidnapping, robbery, and burglary. During voir dire, the prosecutor told eleven of the twelve persons who ultimately served as jurors that the law required them

to impose a death sentence if they found that the aggravating factors outweighed the mitigating factors. All eleven persons stated that they understood the law as explained by the prosecutor and promised to follow it.*

Hamilton was convicted of all charges. He was found to have committed the murder in the course of robbery, kidnapping and burglary. These special circumstance findings made him eligible for the death penalty. During closing argument in the penalty phase, the prosecutor emphasized the limits on the jurors' discretion.

> "Now remember at the time of the voir dire you all promised that in the event that this case went to a penalty phase and the aggravation evidence outweighed the mitigation evidence, you would impose the death penalty. Well, that is the case here, and now is the time. You should not let sympathy for the defendant or his family affect your deliberations."

The trial judge echoed the prosecutor when he instructed the jury: "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death." *Id.*, at 4669. This instruction mirrors California Penal Code Annotated § 190.3, which provides that, "the trier of fact . . . shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." The jury sentenced Hamilton to death.

The California Supreme Court affirmed Hamilton's conviction but set aside the special circumstance findings and reversed the death sentence. 41 Cal. 3d 408, 221 Cal. Rptr.

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*Record 484, 650, 670, 740, 750, 879, 1200–1201, 1247, 1435, 1477, 1518. The prosecutor's exchange with Sandra Sheffield is illustrative. The prosecutor stated:

"Q. If [the trial court] would instruct you that the evidence in aggravation outweighed that in mitigation, *there is no way around it, you'd have to bring back a verdict of death.* Would you follow that instruction as well? A. Yes." *Id.*, at 750 (emphasis added).

902, 710 P. 2d 981 (1985). This Court granted certiorari, vacated, and remanded for reconsideration in light of *Rose* v. *Clark*, 478 U. S. 570 (1986). On remand, the California Supreme Court affirmed both the conviction and the sentence. 45 Cal. 3d 351, 247 Cal. Rptr. 31, 753 P. 2d 1109 (1988). It noted that it had upheld the constitutionality of § 190.3 in *People* v. *Brown*, 40 Cal. 3d 512, 220 Cal. Rptr. 637, 709 P. 2d 440 (1985), even though *Brown* had recognized that "when delivered in an instruction [§ 190.3's] mandatory sentencing language might mislead jurors as to the scope of their sentencing discretion and responsibility," 45 Cal. 3d, at 370, 247 Cal. Rptr., at 43, 753 P. 2d, at 1122. The court further noted that in *Brown* it had barred the future use of the "bare words of the statute," *id*., at 371, 247 Cal. Rptr., at 43, 753 P. 2d, at 1122, and had stated that, with respect, to cases in which the bare words had been employed, it would engage in a case-by-case determination whether the jurors may have been misled as to their sentencing discretion.

Applying *Brown* to the instant case, the California Supreme Court concluded that the instruction did not prejudice Hamilton. It pointed to closing remarks by both the prosecutor and defense counsel which emphasized the jurors' responsibility for the sentencing decision. In addition, the court noted that the trial judge had instructed the jurors that they should weigh rather than count the aggravating and mitigating factors, and that they had to be "convinced beyond a reasonable doubt that the totality of the aggravating circumstances outweigh[s] the totality of the mitigating circumstances" in order to impose a death sentence. *Ibid.* The court concluded that, given the statements, the jurors could not have been misled by the mandatory language contained in the instruction.

II

Because the death penalty is qualitatively different from any other sentence, this Court requires that sentencing in

capital cases be particularized with regard to the individual and the crime charged. See *Lockett* v. *Ohio*, 438 U. S. 586, (1978) (plurality opinion). Toward that end, we have struck down state laws and instructions that prevent a jury from considering any mitigating aspect of a capital defendant's character or background. See, *e. g.*, *Hitchcock* v. *Dugger*, —— U. S. —— (1987); *Lockett* v. *Ohio*, *supra*. We have also held that mandatory death sentences are impermissible because they do not allow for consideration of particularized mitigating factors. See, *e. g.*, *Sumner* v. *Shuman*, —— U. S. —— (1987) (invalidating mandatory death sentence for murder committed by a defendant who is already serving a life sentence); *Roberts* v. *Louisiana*, 431 U. S. 633 (1977) (per curiam) (invalidating mandatory death sentence for murder of a police officer).

The mandatory element of the California trial court's instruction pursuant to § 190.3 runs counter to our demand for individualized consideration in capital cases. It establishes a fixed formula for the jury's deliberations which severely circumscribes the jury's discretion in sentencing. Indeed, the California Supreme Court has conceded in the instant case, in *Brown*, *supra*, and in *People* v. *Myers*, 43 Cal. 3d 250, 233 Cal. Rptr. 264, 729 P. 2d 698 (1987), that a juror who finds that the aggravating evidence outweighs the mitigating evidence, but who believes that the death sentence is not appropriate, may reasonably understand such an instruction to require him to vote for a sentence of death.

Here, the state court found that the instruction's constitutional defect was cured by other instructions that the jurors must weigh aggravating and mitigating factors, and that they must be convinced beyond a reasonable doubt that the aggravating factors prevailed in order to impose the death penalty. Neither of these instructions, however, informed the jury that it retained discretion to impose a life sentence after it had determined that the aggravating factors outweighed the mitigating ones. At no time, furthermore, did the pros-

ecutor or defense counsel suggest that the jurors had discretion in sentencing once they had decided that the aggravating factors outweighed the mitigating ones. Indeed, the prosecutor expressly reminded the jurors that they had promised during voir dire that that they would automatically impose a death sentence if they found that the evidence in aggravation outweighed that in mitigation. In light of the foregoing, it is impossible to know whether Hamilton was sentenced to death because the jurors thought they had no alternative.

The instruction given in this case mandated a death sentence upon a finding that the aggravating circumstances outweighed the mitigating circumstances. Because the instruction does not comport with the individualized sentencing determination required in capital cases by the Eighth and Fourteenth Amendments, I would grant the petition for certiorari.